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Supreme Court of the United States

OCTOBER TERM, 1940

No. 283

RAILROAD COMMISSION OF TEXAS, LON A. SMITH, ERNEST O. THOMPSON, ET AL, APPELLANTS

vs.

THE PULLMAN COMPANY, GUY A. THOMPSON, TRUSTEE, THE ST. LOUIS, BROWNSVILLE AND MEXICO RAILWAY COMPANY, DEBTOR; ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS

BRIEF FOR THE APPELLEES

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BRIEF FOR THE APPELLEES

This brief is filed in behalf of all appellees, the Railroads affected, The Pullman Company, and the Intervener-Porters; and is in reply to the brief for appellants, The Railroad Commission and others, and the brief of the Intervener-Conductors.

Facts Showing Jurisdiction of the District Court—Not Challenged on Appeal

(a) *Findings of Fact.*—The district court found:

"1. The Pullman Company and a number of railway companies operating in Texas and trustees

in charge of railways operating in Texas bring this suit against the Railroad Commission of Texas, the members thereof and the Attorney General of Texas, to restrain the enforcement of a certain order made by the Commission on November 4, 1939. In issuing the order the Commission purported to act pursuant to Texas statutes, and a sum in excess of the jurisdictional amount is shown to be involved. The order is challenged on constitutional grounds. A temporary restraining order was applied for and granted, and the plaintiffs continued to press for preliminary injunction. Accordingly, a case for three judges, under Section 266 of the Judicial Code, is presented. The case has been tried on its merits by a court so organized.

"2. The complaint charged, and the proof shows, that the amount in controversy exceeds $3,000.00, exclusive of interest and costs. Compliance with the challenged orders would devolve upon The Pullman Company an annual gross expense of approximately $41,000.00, or an annual net expense of approximately $36,000.00; and by virtue of certain contracts between The Pullman Company and the railroad companies, a portion of this expense would be passed on to the railroads, but The Pullman Company would ultimately suffer a net annual expense of approximately $25,000.00.

"3. Upon the trial, without objection, leave was granted to three Pullman porters to intervene as plaintiffs, and to three Pullman conductors to intervene as defendants. Each of the porters receives extra compensation of $13.50 per month if on any part of his run he acts as porter-in-charge. If the order of the Railroad Commission, complained of herein, is enforced, the intervening plaintiffs and other porters operating in Texas as porters-in-charge will lose such extra compensation; and their retirement pay will in consequence be reduced." (R. 365-366.)

(b) *Conclusions of Law.*—The district court concluded:

"1. While the challenged orders are directed in terms against the railroads, The Pullman Company is directly affected. The railroads cannot place a Pullman conductor on the Pullman cars except by requiring The Pullman Company to do so. Consequently, The Pullman Company has the requisite interest to challenge the orders. The matter in controversy as to The Pullman Company is the right to carry on its business free of the prohibition of the order. The value of such right is shown to be in excess of $3,000.00, exclusive of interest and costs. Buck v. Gallagher, 307 U. S. 95, 100; Packard v. Banton, 264 U. S. 140, 142; Western & Atlantic R. R. Co. v. Railroad Commission of Georgia, 261 U. S. 264.

"2. Since the order is directed in terms against the railroads and not against The Pullman Company, the only way in which The Pullman Company can obtain effective relief is by means of an injunction prohibiting enforcement of the challenged orders against the railroads. For this reason and for the further reason that the order undertakes to determine, and interferes with, the rights of The Pullman Company in its contracts with the railroads, the railroads are necessary and proper parties to this action. Rule 19, Federal Rules of Civil Procedure; Niles-Bement Co. v. Iron Moulders Union, 254 U. S. 77, 81-82; see also Troy v. Whitehead, 222 U. S. 39, 41; Ducker v. Butler, 104 Fed. (2d) 236, 238 App. D.C. 1939).

"* * *

"4. The orders of the Railroad Commission are challenged on substantial Federal constitutional grounds, and this Court has jurisdiction to determine all questions at issue, local and Federal." (R. 368.)

The foregoing findings of fact have not been challenged at all. Conclusion No. 1 as to the value of the right in controversy was formally challenged by Assignment No. 12 (R. 379), but the assigned error has not been specified, or otherwise brought forward. Conclusion No. 2 is formally assailed by the 13th specification (Appellants' Brief, p. 23) but otherwise it has not been noticed in Appellants' Brief. Misjoinder of the railroads was complained of at the trial by motions to dismiss the action. These were disposed of by the 3rd conclusion of law (unchallenged) as follows: "3. The motions to dismiss the action on the ground of misjoinder are not well taken and should be overruled. Rule 21, Federal Rules of Civil Procedure, and authorities above cited." (R. 368.)

STATEMENT OF THE CASE

Considering the nature of the case and the power of this Court to review the facts, we regard Appellants' Statement as inadequate. We now undertake to make an appropriate, additional statement.

1. Railroad Commission Orders and Findings

At the request of the Order of Sleeping Car Conductors (R. 289), and without notice or hearing, the Railroad Commission of Texas, on August 8, 1939, with certain preliminary recitals, (showing that the professed basis for the order was different (R. 33)

from the basis now espoused by appellants for the order now under review), promulgated this order:

"IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that from and after the effective date of this order no sleeping car shall be operated on any line of railroad in the State of Texas when occupied by passengers holding the proper transportation for the accommodation of such cars, unless such cars are continuously in the charge of an employee or an authorized agent of the firm or corporation owning or operating the same having the rank and position of Pullman conductor." (R. 34.)

The Pullman Company promptly applied to the Commission for a hearing for the purpose of showing that the Commission had no authority to issue such an order. Pursuant to the request, the Commission suspended the order and set the matter for hearing on August 31, 1939. Notice of the hearing stated that the Commission would "take up and consider the matter of operating sleeping cars on any line of railroad in the State of Texas when occupied by passengers holding the proper transportation for the accommodation of such cars, unless such cars are continuously in the charge of an employee or an authorized agent of the firm or corporation owning or operating the same having the rank and position of Pullman conductor." (Complaint, Par. 5, R. 8; admitted in Answer, R. 65.)

The hearing was conducted by an examiner (no Commissioner present) and on November 4, 1939, the Commission issued the order complained of in this suit, amending the original order. The new order contains 29 so-called findings, followed by ad-

judications and decrees, including repetition of the provisions of the original order requiring a Pullman conductor on all trains carrying a sleeping car.* (R. 54.)

In addition to those quoted in appellants' brief, the order contains the following findings not mentioned by appellants:

"(16) The Commission further finds from the evidence that the porters on Pullman cars are negro men. (R. 46.)

"(17) The Commission further finds that if negro porters are placed in charge of the Pullman cars when the service of a conductor is dispensed with that there is imminent danger of insults to the lady passengers on the Pullman cars and that such condition exists in the seventeen operations by the Pullman Company where they do not use conductors, as hereinabove referred to, and that the same constitutes an abuse and an undue and unjust disadvantage and discrimination; that from the evidence of the lady passengers who testified before this Commission, the womanhood of Texas entertains a fear of serious bodily injury or personal attack from a negro man and that to subject them as passengers in Pullman cars to the service where there is only a negro porter in charge would be to such passengers, as well as all other passengers, an undue and unjust discrimination, prejudice and abuse. (R. 46.)

"(18) The Commission further finds that the disorderly conduct among passengers which sometimes occurs on Pullman cars in Texas can not properly be met or handled by a Pullman porter; that every Texan, both man and woman, resents any interfer-

*Admittedly correct copies of the order, original and amended, notice of hearing, and the intervening orders are appended as exhibits to the complaint. (R. 33-54.)

ence or instructions from a negro man or from a negro porter, and the Commission finds that a negro porter would not attempt to and could not discipline a passenger on a car nor would he attempt to prevent any misconduct in such car and if the same should be indulged in to the humiliation of the other passengers on such car, that the same could not be prevented nor quieted by a Pullman porter, while the same could be properly handled and quieted by a Pullman conductor and therefore the same would be an abuse and an undue and unjust prejudice, discrimination and disadvantage. (R. 46-47.)

"(22) (c) The Commission finds that the experience of such passengers with the porter in charge has been unsatisfactory; that the construction of the Pullman cars is such that only little curtains protect the passengers one from another, and that there is a long aisle down the center of the Pullman cars, and the seats and berths are constructed alongside of the aisle, and each berth is separated from the other berths only by these small curtains, and that the lady passengers who occupy such expect and are entitled to the protection, care and service of a Pullman conductor while they are thus traveling, and that to deny them such protection, care and service is an unjust discrimination on the part of the railroads and the Pullman Company.

"(d) The Commission further finds that women prefer not to ride in Pullman cars unless there is a Pullman conductor in charge; that they are unwilling to subject themselves to the supervision of a negro porter and that the practice on the part of the railroad companies and that of the Pullman companies in having the porter in charge is unfair, unjust and unreasonable, so far as these women passengers are concerned.

"(e) The Commission further finds from the testimony that the mothers of small children in Texas

are unwilling to permit their children to ride in Pullman cars where only negro porters are in charge; that they entertain a fear that the children would not be cared for nor protected; that the children of Texas are entitled to the comfort, convenience and service of Pullman cars and that to deny them of this service by failing to provide the necessary employees over and above that of a porter would be an unjust discrimination. (R. 49-50.)

"(27) The Commission further finds from the testimony offered that on different occasions Pullman porters while on duty proceeded to drink excessively and become intoxicated, thereby rendering themselves unable to perform the janitor work required of a Pullman porter, and certainly unable to perform the duties of a Pullman conductor. (R. 51.)

"(29) The foregoing acts and things done and performed by the railroads of Texas and the Pullman Company are unjust and unreasonable and amount to unjust and unreasonable charges for the services rendered by a colored porter alone in charge of a sleeping car. And such service is inadequate to provide for the proper comfort, safety and convenience of the passengers therein and does not meet the requirements of the traveling public and the agreement between the railroads and the Pullman Company." (R. 52.)

The above findings and others, including those appearing in Appellants' Brief (pp. 3-6), are followed in the challenged order by twelve unnumbered paragraphs, purporting to operate as "orders, judgments and decrees." The original order of August 8, 1939, (*ante*, p. 5) directed the railroads to do one thing only, namely, to have a Pullman conductor on every train carrying a sleeping car. The new order, now assailed, repeats this requirement in sub-

stantially the language of the old one, and it "orders, adjudges and decrees" several other things not mentioned in the first order. In this way the Commission has undertaken (a) to enforce the operating agreements between The Pullman Company and the railroads, as construed by the Commission, by requiring the railroads to compel The Pullman Company to perform the operating agreements by furnishing a Pullman conductor on each train; and (b) to amend, or abrogate in part, without specifically mentioning, the existing railroad passenger tariffs.

By statute the intrastate passenger fares are fixed at 3 cents per mile. On December 1, 1933, the railroads filed interstate tariffs reducing passenger fares in western territory to 3 cents per mile for transportation in parlor and sleeping cars and to 2 cents per mile in coaches. They obtained from the Texas Commission a conforming order. (R. 240.) The present order, without mentioning existing tariffs or orders relating to them, undertakes to abolish this differential "unless the facilities and employees and supervision of the work of employees and cleanliness of cars is provided while cars are enroute, all as provided by the terms of the respective contracts with the Pullman Company, are fully provided." (R. 52.) Elsewhere in the order the Commission finds that the way to satisfy such contract provisions is to furnish a Pullman conductor. It does this by saying in various ways that when the Pullman car is operated in charge of a colored Pullman porter alone, without a Pullman conductor, this does not constitute a compliance with the operating contracts (R. 40), and that if the sleeping car

is operated in charge of a Pullman conductor, this will constitute such compliance. (R. 52-53.) The order further decrees that unless the operating contracts are so complied with, no extra fare shall be charged by the railroads or by The Pullman Company in which the railroads will have any share. (R. 52-53.)

Thus the assailed order purportedly deals with three subjects: (a) It requires Pullman conductors on all trains carrying a sleeping car; (b) it undertakes to construe the operating contracts and to enforce them as so construed; (c) it attempts to change existing railroad passenger fare tariffs. Other "decrees" seem to be incidental. The points of argument in Appellants' Brief are confined apparently to the first subject, but the specifications of error are not so limited.

2. Facts Touching the Rate Features of the Challenged Order

The district court concluded: "12. The order of November 4, 1939, cannot be sustained as a rate order for several reasons: (a) It was not made after notice as required by law. Art. 6449, R. C. S. 1925, requires ten days' notice to each railroad to be affected by an order fixing rates. No notice was issued indicating that at the hearing of August 8,* 1939, rate matters would be considered. (b) The rate features of the order are apparently predicated upon the Commission's assumed authority to construe and enforce the contracts between the rail-

*Meaning August 31st, the only hearing date.

roads and The Pullman Company, as to which the Railroad Commission has no authority. (c) In so far as the order attempts to regulate rates charged by The Pullman Company, it is void, since the Railroad Commission of Texas has no jurisdiction over The Pullman Company and no authority to regulate Pullman rates. This question was expressly decided in the case of The Pullman Company v. Railroad Commission, No. 1791, Equity, United States District Court, Northern District of Texas; affirmed without written opinion by Circuit Court of Appeals, Fifth Circuit (1908). Since then the statutes have been readopted in the 1911 Code and in the 1925 Code without change in that respect." (R. 370.)

The above conclusion is replied to by appellants (Error No. 6, Brief, pp. 19-20) by saying that the Commission's order recited and the Commission therein found that all parties interested in the subject-matter had been duly notified for the time and in the manner provided by law. Appellees admit, indeed, in the complaint it was alleged, that 10 days' notice of the Commission hearing was given. But this does not meet the issue. The complaint further charged, and the district court has found, that no notice was issued indicating that rate matters would be considered at the hearing. In the complaint, par. 5, it is alleged (R. 8), and in the answer admitted (2nd defense, R. 65) that Exhibit B attached to the complaint (R. 34-35) is a copy of the notice issued by the Commission. The notice says nothing about rate matters and gives no intimation that rates will be considered at the hearing. It refers to the original order known as Passenger Circular No. 164 and

bears a caption identical with that of the original order, stating that it relates to the "Safety, Care, Comfort, Convenience, Proper Accommodation and Transportation of Passengers on Pullman Cars within the State of Texas." (R. 33; 34.) It apprises interested parties that the Commission will "take up and consider the matter of operating sleeping cars on any line of railroad in the State of Texas when occupied by passengers holding the proper transportation for the accommodation of such cars, unless such cars are continuously in charge of an employee or an authorized agent of the firm or corporation owning or operating the same having the rank and position of Pullman conductor." (R. 35.)

Between the date of the hearing on August 31, 1939, and the date of the order, November 4, 1939, the Commission issued three orders, Exhibits C, D and E (R. 35, 36) postponing the effective date of the original order, reciting that such action was taken "in order to provide more time for examination of the record in the above numbered and entitled cause." Each of those orders was captioned as was the original order. When the final order was issued on November 4, 1939, the caption was enlarged, and for the first time the Commission stated in the caption that the order related (in addition to matters originally described) to "Charges, Fares . . . . and to Prevent Abuses, Unjust Discrimination and Extortion in Rates." (R. 37.)

When the railroads and The Pullman Company appeared at the hearing they did so in response to the notice, and they did not thereby enter an appearance for a rate hearing. (We make this statement in

answer to Point No. 2 in the Conductors' Brief, p. 11.) The Commission has not argued the point and has in no way undertaken to challenge the District Court's finding and conclusion that the notice was not a sufficient predicate for a rate hearing.

3. Facts Touching the Controlling Issues

District Court Findings Nos. 6 and 7:

"6. It appears without contradiction that there are seventeen routes or lines in Texas where Pullman cars, in so far as The Pullman Company is concerned, are in charge of a porter. In most cases this occurs only where the distance traversed is short, and in every instance it occurs only on those trains that, as regularly operated, carry only one Pullman car. These lines are described in Exhibit G* attached to the Complaint. One of them, however, No. 3259, was discontinued prior to the trial. On trains carrying two or more Pullman cars a Pullman conductor accompanies the train. In all instances, however, the general control of the Pullman car or cars and passengers therein is lodged in the railroad conductor. The entire train and the railroad employees and Pullman employees are subject to the jurisdiction of the train conductor.

"7. All of the Pullman porters in Texas are negroes who have been in the service of the company as porters for more than ten years, and those acting as porters-in-charge for longer terms, ranging from twenty years to thirty-four years of continuous service. The men serving as porters-in-charge on the lines in Texas described in Exhibit G have demonstrated that they are substantial, reliable men of good character and good intelligence. By training

*The description in Exhibit G of the 17 lines affected by the order (R. 55-56) is admitted in the answer to be correct. (R. 16, 68.) Graphic descriptions appear in Appellees' Original Map Exhibits 19-35, incl., of hich additional photostatic copies are with the record.

and experience they are qualified and competent to discharge the duties assigned to them as porters-in-charge; and the fact that they are negroes and are called porters-in-charge does not disqualify them or render them incompetent. The service rendered to passengers in the Pullman cars on the trains not accompanied by a Pullman conductor is in no way inferior to the service rendered on the trains accompanied by a Pullman conductor. The Pullman conductors and the porters-in-charge have had the same training, and they receive regularly the same instructions. There is no need of a Pullman conductor in addition to the porters-in-charge on the lines described in Exhibit G. In view of the Pullman Company's experience, extending over a long period of years, there is no reasonable basis for a finding contrary to the facts stated in this Finding No. 7." (R. 367-368.)

Finding No. 6 is unchallenged. Appellants have formally challenged No. 7 by saying that the Court's findings therein "are contrary to the evidence and are not supported by the testimony and the evidence in this case." (Error No. 11, Appellants' Brief, pp. 22-23.) Under Appellants' Point III (Brief, p. 70), it is apparently their contention that there was substantial evidence at the trial in conflict with some of the findings in the Court's Finding No. 7. Nowhere has the finding been assailed as being "clearly erroneous." Indeed, no attempt has been made by appellants to show, nor have they even asserted, that, giving due regard to the opportunity of the trial court to judge of the credibility of the witnesses, the Court's Finding No. 7, or any part of it, is clearly erroneous. (Rule 52 (a) of the Rules of Civil Procedure.) No attempt has been made by appellants to show that the Court's findings are not

substantially supported. We take it that they will be accepted by this Court. *Atlantic & Pacific Tea Co. vs. Grosjean*, 301 U. S. 412, 420; *Borden's Co. v. Ten Eyck*, 297 U. S. 251, 261; *Malloy v. New York Life Ins. Co.*, 103 Fed. (2d) 439, 443 (C.C.A. 1st, 1939), certiorari denied 308 U. S. 572.

And yet since this is an equity case, we now show affirmatively that the Findings of the Court are supported. The quoted, italicized language below is taken from Finding No. 7, and is followed by relevant statements from the record:

Finding No. 7 Supported by Record

(a) *"All of the Pullman porters in Texas are negroes"* (Champ Carry, R. 91), *"who have been in the service of the company as porters for more than ten years"* (Vroman, R. 127), *"and those acting as porters-in-charge for longer terms, ranging from 20 years to 34 years of continuous service."*—Intervener-plaintiff Allen Harvey has been in the continuous service of the company as porter for 30 years (R. 181), 20 years as porter-in-charge (R. 183-184); intervener-plaintiffs McBay and West for 20 years each (R. 190, 196); Sample, 21 years (R. 209); Sinclair, with company 33 years, as porter 30 years (R. 216), in-charge 8 years (R. 216); Palmer 20 years (R. 220); Charley Thurmond 34 years (R. 222); Leroy Brown as porter 31 years (R. 203), 8 years on 4 lines as porter-in-charge (R. 203-205); Eli Morgan, many years as porter-in-charge in Texas on 5 different lines (R. 212-213); Noah Lane, many years, including continuous service on one line in-charge for past 9 years (R. 225).

(b) *"The men serving as porters-in-charge on the lines in Texas described in Exhibit G have demonstrated that they are substantial, reliable men of good character and good intelligence."**—They are not young men; their ages range from 51 years, Leroy Brown (R. 203), to 60 years, Sinclair (R. 215). They are married men; nearly all of them have grandchildren. All are native Texans, excepting Brown, born in Arkansas, in service of the company in Texas 31 years (R. 203). In main, they own their homes, some unencumbered, as Harvey (R. 182) and Thurmond (R. 222); and others not completely paid for, as McBay (R. 193), Sinclair (R. 216) and Palmer (R. 220). So far as inquired about,† they are church members: West (R. 196), McBay (R. 191), Harvey (R. 186), Sinclair (R. 218), Lane (R. 226). With a few exceptions, they began while young men working for The Pullman Company. Those who have not worked continuously for The Pullman Company have held other responsible positions. For example, West 10 years in office building at San Antonio; 9 years in army and a

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*This finding, descriptive of men who testified at the trial, should be ascribed in part to observation of them by the Court. Their character, intelligence and competence to discharge the duties of porter-in-charge was established, not merely by their records and by what was said about them, but by their demeanor as witnesses, particularly on cross examination; not merely by what they said but by the manner of saying it and by their deportment throughout. This is implicit in the findings. Rule 52 of the Rules of Civ. Proc.; *Malloy v. New York Life Ins. Co.*, (C.C.A. 1st, 1939), 103 Fed. (2d) 439, 443; cert. denied 308 U. S. 572.

†The porter testimony, after the first 3, was abridged, in deference to intimations from the bench. (R. 203.)

short while in San Antonio post office (R. 200-201); Palmer, army Y. M. C. A. secretary during World War (R. 220).

Great care is exercised by The Pullman Company in selecting only men of good character as porters. They are employed, not by officials at Chicago, but by the district superintendent in Texas and at New Orleans, under whose direct supervision they work (R. 87). And those deemed fit, the top rank porters, after long years of service, are promoted to the position of porter-in-charge. (R. 88-89).

Further support for the above finding appears in what is stated below in connection with remaining portions of Finding No. 7, closely related to above.

(c) *"By training and experience they are qualified and competent to discharge the duties assigned to them as porters-in-charge; and the fact that they are negroes and are called porters-in-charge does not disqualify them or render them incompetent. The service rendered to passengers in the Pullman cars on the trains not accompanied by a Pullman conductor is in no way inferior to the service rendered on the trains accompanied by a Pullman conductor. The Pullman conductors and the porters-in-charge have had the same training, and they receive regularly the same instructions. There is no need of a Pullman conductor in addition to the porters-in-charge on the lines described in Exhibit G."*

The operating department of The Pullman Company is in charge of a vice president at the home office in Chicago, under whom are two assistants at Chicago. The territory is divided into six geographical zones, each in charge of a zone superintendent

Zones are divided into districts and agencies, each in charge of a district superintendent or agent. Under them are assistants, inspectors, instructors and an organization sufficient to carry on the business. (R. 80-81.) Porters are employed by the district superintendents. (R. 87.) For example, porters on trains operating out of Dallas are employed by the superintendent at Dallas; others by the superintendents at Houston, San Antonio, Fort Worth, New Orleans and at Shreveport. (Two of the interstate trains operate out of New Orleans and Shreveport.) Vice president Carry, his assistant, B. H. Vroman, and the district superintendents at New Orleans, Dallas and Houston, and the agent at Shreveport, a former traveling inspector in Texas, testified at the trial. The company has in its employ between 9,000 and 10,000 porters. (R. 82.) As a general rule, the trains that carry several Pullman cars are accompanied by a Pullman conductor (R. 82). Where conditions of travel warrant, the company has operated Pullman cars in charge of porters, not accompanied by Pullman conductors, for 60 years or more. (R. 81, 93.) The method of operating in Texas is similar to that employed in other parts of the country (R. 81-82), and the service in Texas is equal to that elsewhere. (R. 96.) Some of the porter-in-charge operations have been in effect in Texas for 21 years, and a number of them for 15 or 20 years. (R. 93.) As elsewhere specifically shown (*ante*, p. 17) the porters entrusted with the in-charge operations had previously had long service as porters. Before a porter is employed he is interviewed by the district superintendent and if he appears to be quali-

fied he is allowed to make an application, in which he is required to account for his time for the preceding 5 years. The district superintendent or assistant personally interviews his previous employers, and an agent personally checks up his home surroundings. If after such investigation the district superintendent approves his application it is sent to the zone superintendent for his approval. (Irwin, dist. supt. at Houston; with company 28 years; at Houston 20 years as chief clerk, 2nd assistant, 1st assistant, and supt.; R. 174-175; Carry, R. 86-87, Olney, R. 157.) The porter is then given ten days' trial. The porters, and the conductors, are constantly supervised by the district superintendent, his assistants, agents, traveling inspectors, the yard inspectors, the safety supervisors, and the passenger traveling agents, all of whom travel the trains practically all of the time, and while so traveling it is their duty to supervise the service and make reports thereon, same as service inspectors who do nothing else. (Irwin, R. 175-176; Olney, R. 157-158). And the men on every line are inspected at stations on every trip. (Irwin, R. 178; Carry, R. 86.)

Porters Receive Same Training as Conductors

While porters perform services that are not performed by Pullman conductors, the latter have no duties that are not also performed by porters, with the single exception that porters are not placed in charge of more than one car on a train. Conductors receive no special training that is not also given to the porters-in-charge. (R. 132.) They are required to obey the same rules, except that when a Pullman

conductor is on the train he outranks the porters and has general supervision over them. (R. 186, 135, 140.) Schools of instruction or quarterly service and safety meetings are conducted by superintendents and are attended by conductors and porters jointly or in separate meetings. (R. 133-134.) The instructions at all such meetings are identical for porters and conductors. (Vroman, R. 132; Irwin, R. 176-177; Cunningham, R. 283; Olney, R. 159.) Porters and conductors receive regularly identical bulletins of instructors. Conductors and porters-in-charge, as distinguished from other porters, receive identical special instructions. (Olney, R. 158; Vroman, R. 140.) In addition, a superintendent or his assistant or an agent of The Pullman Company, known as a platform man, is at the station and inspects every train originating or passing through such points as San Antonio, Houston, Dallas, Fort Worth, New Orleans, Shreveport, El Paso, etc. This includes an inspection of the Pullman cars, the employees on the cars and the equipment. (Irwin, R. 178; Carry, R. 85-86; Olney, R. 159.)

The company's records have been examined for the purpose of determining whether the service rendered by the porters-in-charge is inferior or equal to the service rendered by the conductors. Vroman, assistant to vice president in charge of operations, testified: "Our reports indicate that the service is just as good on the porter-in-charge lines as it is on lines where we have the supervision of conductors." (R. 98.) The passenger receives identical service on both lines. (R. 133.) Vallett, superintendent at Dallas (30 years with company), said: "I have

found it to be equally satisfactory." (R. 179.) To the same effect is the testimony of Champ Carry, vice president. (R. 84.) Olney (32 years dist. supt., R. 156) testified: ". . . . my experience has been that not only is the in-charge work handled as well, but then both work is done better by a man who runs in charge than a man who doesn't run in charge. He feels his responsibility." (R. 158.)

Testimony of Disinterested Members of Traveling Public

Seven disinterested witnesses, frequent Pullman travelers, familiar with the porter-in-charge service, residents of Dallas, Amarillo, Waco, Houston and San Antonio, testified that the service on porter-in-charge lines is as good as that on the conductor lines. Here, in part, is the testimony of C. A. Goeth,* a native Texan, resident of San Antonio for 50 years, an attorney, whose family consists, among others, of a granddaughter:

"Q. Mr. Goeth, have you had occasion to travel frequently in recent years on trains and on Pullman cars?

"A. I have.

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*Mr. Goeth was the last of the members of the traveling public offered as a witness by plaintiffs. Others referred to had preceded him. At the conclusion of his testimony the Court suggested:

"Judge Sibley: Is there any need of multiplying these witnesses, gentlemen? We have all ridden on Pullmans, and we know that no number of witnesses is going to change our ideas of what is going to happen, unless there might be some extraordinary circumstance.

"Mr. Graves: We will defer to the Court's wishes, then, Your Honor." (R. 262.)

"Q. Have you observed the quality of service rendered by the porters on the Pullman cars?

"A. Yes, sir, I have.

"Q. Will you state whether it has been satisfactory or unsatisfactory from the standpoint of the passenger?

"A. Very satisfactory.

"Q. Do your recall whether you have ridden on Pullman cars that were in charge of a Pullman porter and where there was no conductor present?

"A. Yes, sir.

"Q. Have you noticed any difference in the quality of service rendered by the Pullman Company?

"A. I have not.

"Q. To the passengers under those circumstances?

"A. I have not." (R. 260-261.)

On cross examination:

"Q. In the case of a trip of say eight or ten hours and you were going to place your granddaughter or your other two grandchildren on the Pullman car, would you feel better about it if that car was in charge of a Pullman conductor rather than merely of a porter?

"A. I would not have the slightest concern if it were only in charge of a porter.

"Q. Would you depend somewhat on the train conductor in that feeling?

"A. I would not." (R. 262.)

The testimony of other disinterested witnesses (excepting Clegg) was of like import: Caldwell (R. 161); Mitchell (R. 165); Fish (R. 167); Marsh (R. 168); Shepardson (R. 171); Underwood (R. 202); Strickland (R. 256-257). Clegg, a young man, commended the porter service generally but had no recol-

lection of traveling on porter-in-charge lines. On cross-examination, after saying that he had never given any thought to the matter, he testified:

"Q. You would feel just a little bit safer with your family in there with a white man conductor in charge of that car rather than in charge of a man who does those menial tasks, wouldn't you?
"A. Yes, sir." (R. 260.)

In behalf of defendants: 7 ladies and 4 young men testified as members of the traveling public. Some of them did not claim to have traveled on a Pullman car, and not one spoke from experience on a porter-in-charge line. The substance of their testimony was that, if given the choice between traveling (or, as to the men, of having the female members of their family travel) on a Pullman car (or train) in charge of a negro porter or one with a porter and in charge of a Pullman conductor, they would prefer the latter. Three were married women, who said that they would "feel safer," for themselves or for their children, in a Pullman car in charge of a Pullman conductor. The others (6 of them University students) opined that women passengers would be safer in a Pullman car (or train) in charge of a conductor; and that "on excursions" the students would be less apt to obey a porter than they would a conductor. Elliott Roberts, student, said:

"Q. If your mother were going away do you feel that she would be safer if she were in charge of a Pullman conductor than she would be if only in charge of a Pullman porter?

"A. Well, just from what you have said, yes, sir." (R. 348-349.)

Miss Matala testified:

"Q. Have you had occasion to ride on Pullman trains?

"A. Yes, sir.

"Q. Miss Matala, when you are riding on the Pullman trains do you think you are safer if there is a Pullman conductor in charge of that train than you would be if only a negro porter was in charge?

"A. Yes." (R. 344.)

Miss Muse, an associate social director at one of the dormitories for girl students at the University of Texas, testified:

"Q. Miss Muse, if you were riding in a Pullman car would you feel that you were safer if you had a conductor in charge than you would feel if you had only a porter in charge?

"A. I would.

" * * *

"Q. I understand, but I am asking you this question, do you think the girls—it would be safer for their protection for them to be under the care of a conductor than it would be for them to be only under the care of a negro porter?

"A. Yes, sir, I think so with the conductor.

"Q. Miss Muse, in your travels do you remember seeing a train conductor back in the Pullman cars?

"A. I don't recall.

"Q. You seldom, if ever, see the conductor, do you?

"A. Yes, I do." (R. 345-346.)

Bob Coquat, a University student, testified in behalf of defendants that he and his mother and sister had made an extended trip by train from San Antonio to New York and return on the Pullman, in connection with a trip to Europe. Further:

"Q. Now, Bob, do you think that your mother or your sister would be safer on a train if they were under the supervision of a Pullman conductor than they would be if they were only under the supervision of a Pullman porter?
"A. Yes, sir, I do." (R. 351.)

John Roberts, a University student, testified:

"Q. Do you think the women folks would be safer on the train if there was a Pullman conductor in charge than they would if there was only a Pullman porter?
"A. I believe so." (R. 342.)

Miss Dorman, a University student, testified that she had had occasion to ride on the Pullman cars; and,

"Q. When you were riding on the Pullman trains, do you think that you are safer if there is a conductor in charge than you are if there is only a negro porter in charge?
"A. I think so." (R. 343.)

The Court will observe that the above witnesses were not called upon to distinguish between the function of having charge of the train and of having charge of the Pullman car, under the supervision of the train conductor. Much of the questioning was of that kind. But that point aside, we

submit that such testimony is devoid of legal significance.

On cross examination Miss Hill, Assistant University Librarian, testified:

"Q. Now, you draw a distinction, do you not, between a colored man who has put in long years of experience in the employ of a company like the Pullman Company, acted as a porter and has proved to be trustworthy and faithful and a man of good character, and another man that you don't know anything about?

"A. Well, I think there would be, of course, a difference—

"Q. You would attach—pardon me—

"A. But I think that I would always feel safer if I knew there was a Pullman conductor—a white Pullman conductor on my coach. I have that feeling.

"Q. Do you mean to say that you don't think there are any colored people that are faithful and trustworthy and reliable?

"A. Not at all, no; I don't have that feeling; I think there are.

"Q. As a matter of fact, you know some of them are, don't you, Miss Annie?

"A. Why, certainly; certainly I do." (R. 347-348.)

Testimony of Intervener-Defendants, Pullman Conductors

For the defendants, appellants, the remaining testimony was supplied by two Pullman conductors, interveners-defendants, and two railroad conductors. Cunningham, vice president of the Order of Sleeping Car Conductors, has served as a Pullman conductor for 35 years and Hadley for 15 years. From their

experience they related instances of carelessness and dereliction of duty on the part of Pullman porters serving under them. Cunningham told of an occasion, 11 or 12 years ago, when he was assaulted and injured by an intoxicated porter (not a porter-in-charge); the porter was arrested and afterwards convicted and imprisoned (R. 272). And of another occasion about 15 years ago, when on his train carrying extra cars crowded with cowboys returning from a cattlemen's convention the porter was attacked and injured by some cowboys who claimed that the porter had been impudent to them. (R. 273.) He described one occasion on which a porter had been guilty of neglect of duty because of drinking. (R. 274.) None of these infractions were by porters then or now serving in-charge. In fact, it was admitted that they were exceptional instances rather than typical. There was no testimony of any such conduct on the part of a por er serving as a porter-in-charge. The Pullman conductors admitted that as a rule porters are competent, reliable and of good character. Said Cunningham on direct examination:

"Q. In the main, do you find the Pullman porter to be pretty high-classed colored men?
"A. We do.
"Q. But you do find these exceptions which you have outlined here?
"A. We do find exceptions, yes." (R. 276-277.)

On cross examination:

"Q. You, of course, draw a distinction, Mr. Cunningham, between these colored men that have good

characters and the others that do not have good characters?

"A. Oh, yes, sir; we have got plenty of porters that are good porters, all right. (R. 282.)

"* * *

"Q. You don't pretend, Mr. Cunningham, to say to the Court that conductors are all perfect, and the porters are, in the main, not perfect?

"A. No, sir.

"Q. These frailties are human frailties, are they not?

"A. Yes, sir.

"Q. And these matters that you have mentioned are matters of character, and the conductors, if they are not the right kind of men, are subject to those criticisms too.

"A. Yes, sir, we have some conductors that are not 100% perfect.

"Q. In the main, though, they are good men, are they not?

"A. I think so.

"Q. Just as in the main the porters are good men.

"A. Yes, sir, or anyone else.

"Q. Well, now, they are better than the average, because the company makes an effort to get good men in both capacities, doesn't it?

"A. Yes, sir.

"Q. In the beginning?

"A. Yes, sir, they investigate very thoroughly to find out whether they have got good men before they employ them.

"Q. And keep on supervising them to find out whether they have made any mistakes?

"A. From time to time, yes, sir." (R. 290-291.)

Hadley described a number of incidents involving misbehavior of passengers and carelessness of por-

ters, and special services rendered by him to elderly and frail persons. In all such instances he seemed to be of the opinion that he was capable of rendering better service than could be rendered by a porter, but neither he nor Cunningham had any first-hand information about the way in which porters-in-charge acted in similar situations.

W. L. Beamer has been a train conductor since 1907 but between 1923 and 1935 he devoted his time exclusively to his work as Chairman of the Order of Railway Conductors for the Katy lines. During that time he was not on duty as a conductor. (R. 317.) He told of an occasion when a lady, finding that she was the only passenger in a Pullman car in charge of a porter, stated that it was lonesome in the car and that she preferred to ride in the chair car, to which she moved (R. 319); and of another, in Oklahoma City, where a lady stated that she did not like to go to bed on the Pullman car when there was nobody there but a negro porter. (R. 320.) He said that as conductor he allowed the Pullman employees to look after the Pullman cars but he recognized that the train conductor is captain of the train and he said that if anything unbecoming or any trouble arose on any part of the train, he would try to handle it. (R. 321.)

The remaining witness, Lowery, an M. K. & T. conductor, related an incident that occurred 7 or 8 months ago, reported to him by the Pullman conductor, involving misconduct of passengers, and he handled the matter at the request of the Pullman conductor. (R. 326.) While he claimed that he and the brakeman and the train porter spend most of

their time ahead of the Pullman car, he said: "En route I would go back and check with him (the Pullman porter) to see if our lists corresponded. . . . . Our instructions are to check frequently to see that we are together on the number of passengers in the Pullman." (R. 334.)

He said he was lenient about enforcing the railroad rules but that he endeavored to live up to the rules in the way that the company would approve (R. 333); that he would prefer to have a Pullman conductor for the reason that he would feel less responsibility if a Pullman conductor were back there. (R. 330.) He did not testify to any fact showing incompetency of a porter-in-charge. He stated that in his opinion people in general do not have the respect for the Pullman porter that they do for the train conductor and Pullman conductor. (R. 326-327.) When called upon to relate instances indicating disrespect for porters, he stated that a porter was chased by a drunken passenger through six sleepers into the chair car where he, the conductor, was and appealed for help. He said that this same passenger had also attacked the brakeman and that the Pullman conductor and the porter had previously pulled the passenger off of the brakeman. (R. 327.)

By the standard railroad operating rules (R. 232)* and by Texas statutes,† the brakeman or flagman is required to ride in the rear car of the train

*The rule reads: "Passenger brakeman or flagman will, so far as practicable, ride near rear of passenger trains to observe and acknowledge signals, and may, when necessary, ride in lounge cars and observation sleepers, when it can be done without inconvenience to passengers."

†Art. 6378, R.C.S. 1925.

while the train is in motion. On each of the trains involved in this suit the single Pullman car is the rear car in the train, and the brakeman or flagman customarily rides in that car. (Harvey, R. 189; West, R. 200; Brown, R. 206.) Plaintiffs deemed it unnecessary to make further proof of this fact in view of the following suggestion from the bench at that point: "Unless the other people are going to controvert it, do you think you ought to accumulate that evidence? If they are going to controvert it, all right. You have already proved it by four witnesses." (R. 206.) The appellants at that point made no statement, but Pullman Conductors Cunningham and Hadley later said that some of the brakemen follow the rules in this respect and others do not. They did not attempt to say what happens on the porter-in-charge lines. Cunningham said that the brakeman rides at the back of the train on which he operates out of Kansas City but he said he probably rides there for the reason that it is a flat track. (R. 292.)

Porter and Air Conditioning

While it would seem to be a trivial point, an effort was made to show that porters are incompetent to handle air conditioning equipment. Appellant Cunningham testified:

"Q. What have you found about the porters? Have they caught on to the operation of this air conditioning very well?

"A. Some of them haven't, no.

"Q. Some of them haven't?

"A. No, seems to be all Dutch to some of them." (R. 293.)

He said further that as a rule porters like the temperature warmer than any one else. (R. 293.)

On cross examination he testified:

"Q. Just what is it now that you do in respect to this air conditioning equipment on the train, that a man of ordinary intelligence and a little training can't also do?

"A. Well, there isn't anything." (R. 283.)

Vroman testified that porters and conductors receive identical instructions as to air conditioning (R. 135); and that on all trains the Pullman porter more often than the Pullman conductor actually attends to the air conditioning. (R. 136.)

Each of the Trains Affected by the Order Is a Short Train

They carry one or two, and in one instance three, day coaches or passenger coaches in addition to one Pullman car. (R. 356-357.) Traffic on the porter-in-charge lines is relatively light. For example, Line 3748, San Antonio-Corpus Christi, carries an average of 2 Pullman passengers southbound and 3 northbound. (R. 106); Line 3309, Galveston-Houston, 3 or 4 passengers (R. 217); Line 3128, Ft. Worth-Ennis, 5 or 6 passengers (R. 183); on Line 3265, San Antonio-Ft. Worth northbound and Waco-San Antonio southbound, the traffic is heavier. But it is a daytime operation (R. 108), and the train carries only two day coaches in addition to the Pullman car. (R. 357.) In any emergency the train conductor and the brakeman are of necessity more readily accessible to the passengers on any part of the train.

The train conductor is in charge of the entire train, and he alone has power to eject passengers. (Trainmaster Poole, R. 230.) The railroad company makes no distinction between Pullman passengers and coach passengers. They are all railroad passengers and are treated accordingly. (R. 232.) Rules require railroad conductor and trainmen to protect passengers from violence, actual or threatened, and from insults. (R. 230.) Conductors are required to pass through cars occupied by passengers at least once every hour. (R. 231.) Poole testified that the rules are enforced and it is his business to see that they are enforced. Otherwise, he would be replaced. (R. 232.)

"Q. What does the railroad company do with the view of seeing to it that the rules are actually carried out?

"A. Well, there is various things that we do, depending entirely on the case. We continually make checks, that is part of my job, and several others do the same thing, to see that the rules are complied with; and if they are not, to make necessary arrangements to get them complied with.

"Q. Do you actually ride the trains for that purpose?

"A. Almost continuously." (R. 229.)

Rules referred to are standard operating rules, substantially identical on all railroads. (Poole, R. 232-233; Santa Fe Div. Supt. McKee, R. 236.)

One Pullman Employee Fills Need

As already shown (*ante*, pp. 20-22), there is no work to be done on these one-car lines that is not

now efficiently done by the porter-in-charge. Passengers receive same attention on these lines that they do on other lines. Cunningham on cross-examination said it takes him about 15 or 20 minutes to lift the transportation in the two cars on his regular run carrying an average of 15 to 20 passengers in the two cars (R. 287); and about 10 minutes more to complete his diagram, already started before departure. (R. 288.) On a one-car train, with half the number of passengers, he said he could complete his diagram and take up the tickets in 10 or 15 minutes. He was unable to give a clear account of what he would be doing other than sitting down after completing that process.

"Q. How much of the time would you be sitting down in a seat?

"A. Oh, probably I would be sitting down more than I would on a heavy car, because on a heavy car you have more duties to perform and more to look out after." (R. 288.)

Skill, Tact and Competency of Porters-in-Charge

The Court will understand that the experienced porter's talent for adapting himself to the exigencies of travel, including the handling of intoxicated passengers, will not be revealed by the record to the extent that it was made evident at the trial. Here, again, the district court's findings are to be ascribed, in part, to what the three Judges observed, and not merely to what they heard. Indeed, the findings accord with the common knowledge of all who have traveled considerably on Pullman cars. The resourcefulness of the porters is per-

haps best illustrated in the testimony of Allen Harvey, the whole of it (R. 181-189), and of Noah Lane (R. 225-228). Harvey testified in part:

"Q. Have you ever had any experience with drunk passengers on the train?

"A. Well, I have seen them drinking, but I have never had no trouble, never did have no serious trouble, no sir.

"Q. Have you ever had an experience with a drunk passenger that you couldn't handle by yourself?

"A. No. sir, I never did. I have always pacified them and got them to bed or got them quiet some way or another, you know.

"Q. Well, how do you go about handling that? Do you order them around?

"A. Oh, no, sir, you couldn't do that, you know.

"Q. What?

"A. You couldn't do that and get no where with that, Judge, no, sir. You have to handle them with gloves. Even if you had a conductor he couldn't do that, just order them around, because it wouldn't go. You would sure have trouble then.

"Q. Have you ever had any experience on the train where a drunk passenger insulted another passenger?

"A. No, sir, I never have, no sir." (R. 185.)

On cross examination:

"Q. What does it take to be trouble?

"A. Well, somebody that is interfering or wants to fight or disturbing other passengers, that is what I would call trouble.

"Q. How long has it been since you asked a man to be quiet or to change his conduct in any way?

"A. Well, to change his conduct—well, I have

had them probably in the smoker would get a little loud. They would be bothering nobody, but among themselves, three or four men, they would be a little loud, talking, and the way I would get that quiet is I would go in and ring a false bell myself and I would say, 'That man say he can't sleep,' and that is the way I would work that." (R. 187.)

Noah Lane, native Texan, age 53, resident of Dallas 35 years, has been continuously operating for 9 years on the Dallas-Austin car (Line 3259) on the M. K. & T. railroad, member of a church, total abstainer from liquor, knows most of passengers who travel between Dallas and Austin. He receives the in-charge compensation, since southbound the car sets out at Austin at 4:30 A. M. and is in his charge until 7:30 A. M., and northbound it is in his charge while waiting at the station at Austin from 11:30 P. M. to 1:00 A. M., when it is picked up by the train from San Antonio. (R. 225-226.) When asked to explain how he got along with drunk passengers, he said:

"I humor them. . . . . Yes, sir, and coax them along. I get along with them all right.

"Q. Get along with them all right?

"A. Yes, sir, I have at times when they was drunk, and one occasion—it has been a good long time ago, about 13 or 14, if I make no mistake, I had a man that was drunk, and the conductor didn't want to let him on because he was drunk.

"Q. You mean the Pullman conductor?

"A. The Pullman conductor, yes, sir. I knew the man very well and I said, 'If you will let me have him', he was kinda bad, and I said, 'if you will let me handle him we will save trouble for all con-

cerned.' Well, he went along and let me alone, and I got him on the car and he wouldn't give up the tickets to the conductor and I said, 'if you will just leave him to me I will take care of him'; I said, 'I know him and I will take care of him,' but I was afraid to let him go to bed because he had two guns on, and I was afraid to let him go to bed with those guns on because he might wake up in his sleep and take a shot at somebody, just for fun in his sleep, or something, and I coaxed and begged him to let me have his guns, and put them away, and said I would keep them for him until in the morning, and after I persuaded with him for a long time 'if you will wear them I will let you have them', he said, and well, you can see my size; he was small, and the belt wouldn't go around me with the two guns on it, and I wanted to put them in my locker, and he said, 'no, you have got to wear them'. I said, 'well, they won't meet, the belt won't meet on me, that's all'. He said, 'get a string and tie it on', and so I taken a string off of a linen bag, and I made the belt meet, and fastened the guns on me that way, and he still wouldn't give his tickets up to the conductor; the conductor was Charlie Dannish,* if I make no mistake, that was his name; I said, 'if you will just leave him to me I will get his tickets from him; just leave him alone and leave him to me', which he did, because he said if he had to come back in the car again, he would have some fun with him. So the conductor stayed outside and so the next morning we were going into Hillsboro and he got up, he just waked up and got up, and I met him and I says, 'Mr. Lee', I says, are you getting along all right'? He says, 'Yes, yes, fine'. I says, 'now, when you have got time I will take your tickets'. I said, 'you didn't give up your

*This was the railroad conductor, evidently on the train that had arrived from San Antonio, en route at that time from Austin to Dallas.

tickets last night'. He said, 'didn't I?' I says, 'No, sir'. 'I didn't, he says, 'why, I don't know why I didn't'. I says, 'you told me you had done give them to me', and then he said 'come on help me find them' and so he and I looked through his clothes and we found them in his watch-pocket in his vest and he had the Pullman and Railroad tickets, and gave them to the conductor; and, of course, from that time he was all right. You call that trouble, but I call it fun. On Friday night, I had a man here that was down here and he didn't have his clothes on, and he was unusually loud and I told him, I says, 'please, be quiet', I says, 'there is a lady here'; he used some pretty bad language and I said 'please be quiet, a lady will hear you' and he said, 'all right, I won't say any more'; and I got him to bed; I was about an hour late getting him there; of course, I was fixing to go to bed and I was about an hour late getting him in bed but I finally got him in bed and I seen that everything was all right and he was asleep and he had his pants lying down spreading out in the middle of the floor and I was afraid that his purse might drop out, so that was why I stayed up to see if he was asleep, and after he was asleep I went to bed, and the next morning he woke up and was all right and didn't know anything about it. Those are the most serious cases I have had with drunks.

"Q. Well, you have never had any trouble, then, with drunk passengers that you couldn't handle?

"A. No, sir.

"Q. Along those lines?

"A. No, sir." (R. 226-228.)

He was not cross examined. (R. 228.)

Intervener McBay testified:

"Q. How do you go about handling a drunk passenger?

"A. If a man is drunk on the car, the first thing I try to do is to get him to bed. If you can get him to bed, pretty soon he will go to sleep.

"Q. Do you give him any instructions or orders?

"A. No, sir, I don't give him any orders; I just coax him along. I give him service and try to get him to bed. If you can get him to bed, he is not into trouble.

"Q. What are your instructions in case you should have a passenger on your car that you could not handle?

"A. I would first notify the train conductor." (R. 192.)

"* * *

"Q. Have you had any trouble of any kind?

"A. No, sir; never in my life.

"Q. Ever let a passenger make you mad?

"A. No, sir.

"Q. Suppose a passenger were to abuse you?

"A. Well, that is my job; I am supposed to take it. I am not supposed to get angry.

"Judge Allred: You mean if you get angry, you don't let him know anything about it?

"A. I am not so easily made angry." (R. 193.)

On cross examination:

"Q. Does the Pullman conductor ever have anything to do with disorderly passengers?

"A. You mean like a drunk man or something like that?

"Q. Yes.

"A. The porter has that mostly to do. It is the job he has to worry with." (R. 194.)

Intervener W. J. West, after stating that he had never had any personal trouble with passengers, said that in two instances he had called on the train

conductor in connection with drunk passengers and that the train conductor had handled both situations. (R. 198-199.) Further:

"Q. Have you ever had any experience on these cars where one passenger was mistreating another passenger?

"A. Well, one experience, where it would have been a mistreatment if probably I had not been right there and prevented it from being a mistreatment.

"Q. Did you have any trouble handling it?

"A. No, sir; I did not have any trouble handling it." (R. 199.) As to this he was not cross examined.

Their competency is further reflected in the testimony of Brown (R. 206-208); Morgan (R. 213); Palmer (R. 220); Sample (R. 210); Sinclair (R. 215-218); Charley Thurmond, when asked whether he thought he was qualified to handle drunk passengers, said: "Well, I can only cite my past record in handling them; from that standpoint I feel that I am." (R. 224.)

The testimony of the Pullman conductors showing a few exceptional instances (out of many years) of breaches of discipline and dereliction on the part of incompetent porters proves nothing against porters who have been competent, faithful, and whose conduct has been above reproach. The record is devoid of evidence reflecting discredit of any kind upon the porters operating in charge. There is no evidence that a porter, trusted with the responsibility of operating in charge, has ever been guilty of being intoxicated or of drinking liquor on duty. Indeed, in so far as it was inquired about, it was affirmatively

shown that the porters-in-charge are total abstainers. (R. 186, 191, 226.)

By the testimony of the 10 porters it was established that during their entire experience as porters-in-charge they had had no serious trouble with passengers, and that Pullman passengers on their cars had been adequately protected and properly served.

Appellees deemed it unnecessary to accumulate further testimony of porters, especially in view of suggestions from the bench after the Court had heard three of the porters that we should stipulate as to the others. The Court intimated that additional porter witnesses would be heard to afford the defendants the opportunity of cross examining them. (R. 203.) After nine of them had testified, opposing counsel indicated that they did not desire to cross examine further. (R. 225.)

The Order Is Found to Be Without Rational Basis

(d) *"In view of The Pullman Company's experience, extending over a long period of years, there is no reasonable basis for a finding contrary to the facts stated in this Finding No. 7."* (R. 368.)—The effect of this concluding sentence of the Court's findings is that there is no rational basis for the challenged order, since the findings made by the Court in Finding No. 7 conclusively negative the existence of any facts that would support the order. By this final statement the Court has said, in effect, that the facts as found in Finding No. 7 do not rest upon a mere preponderance of the evidence. They rest upon evidence so conclusive as to leave no room for reasonable minds to differ about it. This is equivalent to

saying that there is no conceivable state of facts by which the order can be supported.

The combined experience of the 10 porters who testified is equivalent to an experience record of the typical porter-in-charge of more than 226 man-years. Four of the 10 have a combined service record of more than 125 man-years, (*Ante*, p. 15). By the undisputed evidence it appears that this record of the porters-in-charge is one of faithful, competent service. The railroads with whom the company is under contract to furnish the service are satisfied with it. No complaint is shown to have come from the members of the traveling public who have been served by the porters-in-charge. The Pullman Company and the porters themselves warrantably take pride in it. Only the Pullman conductors have complained, and they have furnished no evidence reflecting discredit upon the service rendered by the porters-in-charge. The rare instances of dereliction of duty by a few of the other porters (not in charge) proves nothing. It furnishes no more ground for outlawing these top-grade porters than would occasional lapses of some of the conductors constitute valid support for a penal order forbidding the operating of the cars in charge of conductors.

Summary of Argument

1. In response to Appellants' Point of Argument I (Appellants' Brief, p. 31) we will show that subdivisions (a) and (b) present questions that were not raised at or before trial; that they are unsubstantial; that factually the statement that the rail-

roads charge, or that the contracts between them and The Pullman Company require the charging of, fares in excess of the statutory maximum of 3¢ per mile is contrary to the record; is contrary to the Commission's own finding (R. 41); and that The Pullman Company is not engaging in the railroad business. As to subdivision (c) of Appellants' Point I, we will show that, jurisdiction having attached on substantial Federal questions, the issues of fact and of law, State and Federal, have been properly tried on the facts adduced at the trial. Such an attack on the order is not collateral, and the trial is not confined to a mere review of the Commission record.

2. *The State Question*—The challenged order cannot be sustained by referring it to any power delegated to the Commission to prevent "unjust discrimination" as defined by Article 6474. The operation of the single Pullman car trains (without a Pullman Conductor) in charge of a porter under the supervision of a train Conductor is not unjust discrimination as defined by statute. The Commission cannot supplement the definition; and the Commission has no power to prevent "unjust discrimination" by issuing the order complained of. Our references, throughout, to the challenged order, unless otherwise indicated, are to the part of it that forms the basis of appellants' brief and is quoted in the district court's opinion, 33 Fed. Supp. 675 (R. 360), *ante*, p. 5. This prohibitory feature of the order was at first promulgated by the Commission without notice or hearing. When so issued the Commission did not pretend that it was designed to pre-

vent "unjust discrimination." On its face it professed to be a regulation designed to promote "the safety, care, comfort, convenience, proper accommodation and transportation of passengers on Pullman cars within the State of Texas." (R. 33.) When notice was thereafter issued for a hearing to consider whether the order would be set aside, the notice stated that the Commission would consider the above mentioned order, so entitled, and for such purposes. Nothing was said about unjust discrimination. After the hearing when the order was reissued with the same prohibitory clause (R. 53), and a great deal more, the Commission for the first time made reference to the matter of unjust discrimination. It is now sought to be upheld, but can not be sustained, upon that basis.*

3. *The Constitutional Question*—The order is without rational basis, and contravenes the 14th Amendment, the due process and the equal protection clauses. Findings of the district court (Nos. 6 and 7, *ante*, p. 13) (the former unchallenged and the latter ineffectively challenged)

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*Whether the Commission has acted within its statutory powers is a question of State law. It has been decided by a district court of three judges. The two district judges are Texas judges, and the circuit judge, Judge Sibley, has been a United States Judge in the Fifth Circuit since 1919, District Judge from 1919 until 1931, and United States Circuit Judge since January 30, 1931. Judge McMillan is a Texas lawyer of wide experience; he appeared in this Court 20 years ago as attorney for the then largest city in the State in *City of San Antonio v. San Antonio Public Service Co.* 255 U. S. 547 (1921). Judge Allred, after representing the Railroad Commission for four years as Attorney General of the State, served for four years as Governor.

are supported by the facts showing: that there is no need of a Pullman conductor on the single Pullman car trains; that the required service is competently rendered by the porters acting in the capacity of porter-in-charge under the direction of the train conductor. The trains are short trains, carrying only one sleeping car. To require the railroads to compel The Pullman Company to furnish a white Pullman conductor on such trains is an arbitrary requirement. The porters, condemned in the order as incompetent to perform this function because they are negroes and not white men, are shown to be competent—men of good character, good intelligence, and proper training. The experience of the company over a long period of years of operating these single car trains under that method has demonstrated that it is a successful and satisfactory method of operation. Porters receive extra compensation for serving in that capacity; and the order, if sustained, will deprive them of it, and hence denies to them due process and equal protection of the laws as guaranteed by the 14th Amendment. No effective effort has been made by the appellants in their brief to show that the court's findings establishing the competency of the porters to serve in that capacity are erroneous. Appellants contend that the question has been foreclosed by the Commission's findings; and that, since jurisdiction does not rest upon diversity of citizenship, the district court had no right to inquire into the facts, but had the power only to review the Commission's record for the purpose of determining whether there were any facts at the Commission hearing, or suf-

ficient facts at that hearing, to sustain the order. Such contention being plainly erroneous, there has been no effective attack made in appellants' brief on the findings and conclusions of the district court.

Other points of argument are subordinate and incidental. The two controlling questions are those referred to under 2 and 3—that is, the one State question and the Constitutional question. Unless we are wrong on both of those questions, the judgment below must be affirmed.

4. Appellants have contended (Point V, Brief, p. 80) that the court below erred in granting a blanket injunction, in the face of the provision in the Commission's order authorizing interested parties to apply to the Commission for permission to "deviate" from the order. The meaning of this exemption clause was inquired about by the court at an early stage of the trial and the Commission was requested to state its position. The question was evaded. Counsel for the Commission attempted to state his personal opinion, viewing the order in an objective sense. In view of the Commission's answer to the complaint and in view of the findings contained in the order itself, the court properly concluded that the plaintiffs were entitled to a trial. The order recites, and the court has found, that there are 17 lines in the State of Texas in which the single Pullman car is in charge of a porter without a Pullman conductor, but under the supervision of the train conductor; that all of these porters are negroes. The Commission has found in its order that it is a discrimination and an abuse to operate the trains in that way. It maintained this position at the trial

and it so contends now. It has not intimated or suggested that, so long as the trains are operated in that way, any exemption from the portion of the order above referred to will be allowed. But aside from that, the Pullman Company and the porters are adversely affected by the order and they and the railroad company involved would be entitled to complain if only one line were involved. Again, if the failure to provide a Pullman conductor amounts to "unjust discrimination" within the meaning of the penal statute now relied upon by the Commission, Art. 6474, the Commission has no power to permit a deviation that would amount to a suspending of the penal statute. The suggestion that it might be willing to suspend the statute is tantamount to an admission that the alleged gravamen of the offense is innocuous.

ARGUMENT

I.

A. Appellants' Point of Argument I(a) (Brief, p. 31) is devoid of merit since:

(a) By the undisputed evidence it appears that the maximum railroad fare charged by the railroads for passengers riding in the Pullman cars is 3 cents and not 4 cents, as stated by appellants, *infra*, p. 51.

(b) The contracts between The Pullman Company and the railroads do not "call for charging passenger fares of more than 3 cents per mile."

(c) The challenged order commands the railroads to act through The Pullman Company. It requires

the railroads to effect an arrangement whereby ever train carrying a sleeping car shall be in charge of an employee or an authorized agent of the firm or corporation owning or operating the same "having the rank and position of Pullman conductor." (R. 53.)

(d) The point was not mentioned or suggested before or at trial. Indeed, it has not been assigned as error unless it is within the purview of Error No. 2 (Brief, 18) or No. 3 (Brief, 18), not precisely this point. The points presented in Errors 2 and 3 were not seasonably raised. Plaintiffs were in no manner apprised at or before trial that they would be relied upon as a defense.

(e) The challenged order does not proscribe existing rates on the ground that they are not authorized by a tariff approved by the Railroad Commission, as asserted in Error No. 2.

(f) In so far as the order requires a Pullman conductor on each train carrying a sleeping car, the prescribed remedy bears no reasonable relation to the so-called evil of charging extortionate rates.

(g) No hearing has been called or conducted by the Commission to determine whether existing rates are extortionate.

(h) The order expressly commands the railroads to observe and perform contracts with the Pullman Company, as construed by the Commission. (R. 42, 52, 53.) Hence the order cannot be supported on the ground, presented after trial and judgment, that the contracts are illegal and void.

(i) Error No. 3 complains of the Court's failing to sustain motions to dismiss the complaint for de-

fects said to be apparent on the face of the complaint. Such objection to the complaint was not raised in the motions or in the answer. And the complaint discloses no such vice. Nothing is quoted from the complaint or in substance stated in appellants' brief in support of the assigned error.

(j) The suit was not instituted to enforce any provision of an operating contract, or to recover damages for its breach. As stated in the Court's 1st Conclusion (R. 368), unchallenged, the action was brought to vindicate the right of the plaintiffs to carry on their business unmolested by the prohibitions imposed by the challenged order. Such rights are in no way conditioned upon any so-called illegal provisions of the contracts.

(k) The contracts contain no provision purporting to regulate railroad passenger fares; and, as to sleeping car fares, they merely provide that such fares shall be on a parity with whatever fares are charged on a competing line. (R. 6.)

(l) While by the terms of the operating contracts the railroads, under stated conditions, are required to make payments to The Pullman Company; and in other contingencies The Pullman Company is to make payments to the railroads; it does not appear in the record that, pursuant to such provisions, the railroads have received or have been entitled to receive, any money from The Pullman Company; much less does it appear that such payments have been made or have been due by The Pullman Company to the railroads by reason of operations on the porter-in-charge lines. Nor does it appear that any railroad has collected anything from The Pullman Com-

pany arising directly or indirectly from the payment of sleeping car fares by intrastate passengers in Texas.

(m) Even if it be assumed that the railroads have received payments from The Pullman Company pursuant to the operating contracts, the assumed fact would not show that intrastate sleeping car fares paid by Texas passengers constitute railroad passenger fares within the meaning of the 3 cent fare statute.

In stating (Appellant's Brief, pp. 12, 34) that the railroads exact a railroad fare of more than 3 cents per mile for passengers riding in the Pullman cars, appellants have misconceived the record. Not only is there nothing in the record to support the assertion, but the undisputed record is to the contrary. W. J. Rogers, Chairman of the Southwestern Passengers Association, and publishing agent under power of attorney on file with the Interstate Commerce Commission, testified:

"Q. What are the maximum fares prescribed by the Interstate Commerce Commission?

"A. For transportation in sleeping or parlor cars, three cents per mile. For transportation in coaches or chair cars in western territory, it is two cents per mile. (R. 239.)

"* * *

"Q. Has permission been granted by the Interstate Commerce Commission to charge a higher fare in sleeping cars than day coaches?

"A. The Interstate Commerce Commission, as I say, set the three cents per mile as the maximum charge for transportation in parlor and sleeping cars, and a lower charge for coaches.

"Q. And that applies with regard to interstate business in Texas as well as any other place?

"A. Yes, sir; we voluntarily reduced the passenger fares in western territory on December 1, 1933, to three cents for transportation, parlor and sleeping cars, and two cents coaches, we went to the Railroad Commission for the necessary authority to put in the same rate in Texas, and that authority was granted us." (R. 240.)

He testified on cross examination:

"Q. Mr. Rogers, to ride in a chair car in Texas, a passenger is required to pay two cents a mile?

"A. That is the coach rate.

"Q. Then if that same passenger desires to ride on the Pullman, he is required to pay to the railroad company an additional one cent per mile?

"A. He pays three cents per mile. The difference happens to be one cent, yes, sir.

"Q. He pays three cents a mile, then?

"A. Well, in Texas, of course, the statute rate is three cents a mile. The Railroad Commission, on their own initiative, reduced the coach fare to two cents a mile." (R. 243.)

The Commission made an express finding (R. 41) in accord with the foregoing testimony, and in irreconcilable conflict with the contention now made by it.

B. The Pullman Company does not operate a railroad in Texas, and the contracts between it and the railroads do not contemplate or require such operation by it.

(In reply to Point I(b), Appellants' Brief, stated, p. 32, argued, p. 35.)

Appellants contend that appellees' claim is based upon certain contracts and that these contracts are illegal and void because they contemplate that The Pullman Company will engage in operating a railway in the State of Texas without being incorporated as such as a Texas corporation. The Pullman Company does not operate a railroad in Texas and the contracts between it and the railroads do not contemplate or require such operation by it. The Pullman Company is a sleeping car company, distinctively taxed as such by the State.

The State of Texas in many ways differentiates between railroad corporations and sleeping car corporations. Texas imposes an occupation tax, measured by gross receipts, on "every sleeping car company . . . doing business in this State . . . ." Article 7063, R. C. S. 1925, as amended. (Appendix, p. 110.) Railroad companies, however, are required to pay an intangible tax. Articles 7098 and 7105, R. C. S. 1925, as amended (Appendix, pp. 110-111.) Railroad corporations are not subject to the gross receipts tax on their railroad operations, and sleeping car companies are not subject to the intangible tax.

The challenged order attempts to regulate the manner in which The Pullman Company may conduct its business within the State of Texas. The order obviously proceeds upon the factual assumption that the business conducted by The Pullman Company is one that it is lawfully entitled to conduct in Texas; otherwise, why tell the Company that it must conduct that business in a particular way; why attempt to subject the Company in the

conduct of its business to the standards set up in the order? It is a contradiction in terms to say that the Company must conduct its business in the manner pointed out in the order and then to say, as does the Commission by way of defending the order, that the Company has no lawful right to conduct its business in any manner within the State of Texas. Moreover, the fact that the State has subjected the Company in the conduct of its business to an occupation tax levied on those lawfully engaged in the sleeping car business establishes conclusively that the Company has the lawful right to engage in the business that is being taxed. *State of Texas v. Texas Brewing Company*, 106 Tex. 121, 126. The State having subjected the Company to the regulatory and tax burdens applicable to lawfully conducted businesses, the Commission cannot defeat this suit by contending that the business thus regulated and taxed is an unlawful business. A somewhat similar, facing both ways attitude in respect to the conduct of a business was condemned in *Smith v. Illinois Bell Telephone Company*, 282 U. S. 133, 143-144.

In *Pullman Palace Car Co. v. State of Texas*, 64 Texas 274 (1885), the Court recognized that a railroad company may legitimately operate its own sleeping cars and charge extra compensation therefor, in addition to the fares charged for transporting passengers. The Court said that whether such business is carried on by the railway company or by a sleeping car company, it is a distinct occupation. Such is the predicate for sustaining the occupation tax to which The Pullman Company is now sub-

jected. In the case cited the tax was avoided because the statute exempted railroad companies and thereby was held to be in contravention of the uniformity provision of the State Constitution. The exemption has been removed from the statute and the occupation is now validly taxed, without regard to whether it is pursued by a railroad company or by a separate corporation not engaged in the railroad business. The Court said:

"The business or occupation taxed under the act in question is certainly nothing more than the running of cars of a certain kind on railways for the purposes for which such cars are ordinarily used. This is the business or occupation of a railway company, in so far as it runs its own cars of the same kind on its own road for the same purposes, making a charge for the use of such cars other than is made for the ordinary transportation of passengers, on account of the increased comfort and convenience to passengers afforded by the use of such cars. A business or occupation separate and apart from its ordinary business of transporting passengers; and on this ground only can be defended the demand or receipt of any sum whatever in excess of the rate fixed by law for the transportation of passengers."* (64 Texas 277.)

In *Duval v. Pullman Palace Car Co.*, 62 Fed. 265 (C.C.A. 5th, 1894), plaintiffs in two consolidated cases sued The Pullman Company for damages for failing to transport them in the drawing room from

*The passenger fare statute of 3 cents per mile, enacted in 1883, then stood as it does now. 9 Gammel's Laws, p. 376; Gen. Laws 17th Leg. (1883), p. 70. See present statute, Art. 6416, Appellants' Brief, p. 86.

Denver, Colorado, to Fort Worth, Texas. The car had been turned back by the Union Pacific Railroad at Texline because of a washout ahead. The Court held at p. 269:

"The defendant company is not liable as a carrier. It made no contract to carry. The plaintiffs had paid their fare to the railroad company, and were provided with first-class tickets entitling them to be carried from Denver to Ft. Worth by it. It was the duty of the railroad company to convey them over its line, and they were being carried by it. The defendant's sleeping car constituted a part of the carrier's train. The plaintiffs secured the privilege of riding in this car by paying an additional sum to the defendant. The obligation of the defendant, under its contract with the plaintiffs, was to accommodate them with the drawing-room in its car, constituting a part of the carrier's train, as long as the carrier would convey it. If the carrier refused to convey it beyond Texline, and turned the car back to Denver, these were not the acts of the defendant company, and they would form no basis for the complaint against it in this suit. Railroad Co. v. Roy, 102 U. S. 451."

There are no Texas decisions contra.

In *Pullman Company v. Hays, et ux* (Tex. Civ. App. 1924), 257 S. W. 686, the court held that The Pullman Company was not a common carrier. The case involved the theft of a passenger's personal effects and the Court held that The Pullman Company was only bound to exercise reasonable care to guard against such theft. The Court said, at page 687: "A Pullman Company is not liable as a common carrier or as an innkeeper, yet it is its duty to use

reasonable care to guard the passengers from theft, * * *." In accord are *Pullman Company v. Moise* (Tex. Civ. App. 1916), 187 S. W. 249; *M. P. R. Co. v. Groesbeck* (Tex. Civ. App. 1894), 24 S. W. 702.

In 1907 the Railroad Commission attempted to prescribe Pullman fares and was enjoined by the United States District Court, which held that the Commission's statutory power to fix railroad rates does not embrace the power to fix Pullman fares. The judgment was affirmed by the Circuit Court of Appeals without written opinion. *Pullman Co. v. Railroad Commission*, No. 1791, Equity. United States District Court, Northern District of Texas. This is reported in the Biennial Reports of the Attorney General of Texas, 1906-1908, p. 36, *infra*, p. 114. The statute in this respect has not been changed (but has been re-adopted twice, Codes of 1911 and 1925) and since then the Railroad Commission has not attempted to regulate Pullman fares.

In *Ft. Worth & Denver City Railway Co. v. State*, 99 Texas 34, 87 S. W. 336 (1905), the Court had occasion to pass upon the relationship between The Pullman Company and the railroads under the contracts then in existence. Since then the contracts have been changed in details but the relation between The Pullman Company and the railroad companies, and their respective functions under the contracts, have undergone no substantial change. The Court in that case, on page 341, said:

"* * * the railroad company would be benefited by the increased revenue of the other company by reduction or release from mileage, but it had no power over the charges of The Pullman Company.

It is manifest that the contract did not in any way affect, or tend to affect, transportation, or charges therefor."

The significance of that decision here is that the Court again recognized the distinction between the business of operating a railroad and the business of operating a sleeping car company.

Appellants have cited the case of *Philip A. Ryan Lumber Co. v. Ball*, 197 S. W. 1037, and the case of *Pennsylvania RR. Co. v. S. T. L. A. & T. H. R. Co.*, 118 U. S. 290, in support of their position. The Pennsylvania Railroad case has to do with the charter powers of railroads under the laws of Illinois and Indiana. It clearly has no application to the present case. The Ryan Lumber Company case is not in point, for under the facts stated by Appellants in their brief, the Ryan Lumber Company, a Tennessee corporation, made a contract to transport logs by railroad. The Court held that it was necessary that the Lumber Company obtain a charter under the Texas law and it not having obtained such charter, the contract for the transportation of the logs was invalid. The contracts between the railroads and The Pullman Company contain no such provision. The record in this case does not show that The Pullman Company undertakes to transport passengers, or that it has any motive power for transporting passengers, and by the express terms of the contracts between The Pullman Company and the several railroad companies, the obligation of transporting the cars is devolved exclusively upon the railroad companies (Original Exhibits 2-14).

C. The present action, challenging the Commission's order on substantial federal constitutional grounds, is a direct attack, and is cognizable in the United States courts.

(In reply to Appellants' Point I(c), Brief, stated, p. 29; argued p. 38.)

1. *The attack is direct.*—This attack is no less direct than was the first federal court action of *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362. True, that suit was held to be a combined statutory-equity action, but in both aspects the attack was direct, as it is here. If, as ruled by Judge Hutcheson in *Henderson v. Terrell*, 24 Fed. Supp. 147, the suit authorized by the Texas statute, Art. 6453, (grounded upon the claim that the order is "unjust and unreasonable") is not available except where jurisdiction is predicated (at least in part) on diversity of citizenship,* the consequence is that the present action is purely equitable, and the statutory grounds above mentioned are not involved.

But, this being an action against the Commission and its members, challenging the validity of the order, and seeking to enjoin its enforcement, there is no ground for appellants' notion that the attack is a collateral one. In support of their contention appellants (Brief, p. 41) have quoted a portion of Judge Hutcheson's opinion in *Henderson v. Terrell*, 24 Fed. Supp. 147, but they failed to note the immediately succeeding portion of the opinion, answer-

*The Court needs no suggestion from us as to whether such ruling has now been approved by this Court in *Railroad Commission of Texas v. Rowan & Nichols Oil Co.*, No. 218, October Term, 1940, decided January 6, 1941.

ing the point against them, as follows: "Their bill, however, does sufficiently make out a case arising under the Constitution and laws of Texas of which this Court has jurisdiction, one requiring three judges." (24 Fed. Supp. 149.) See, accord: *Boxrollium Oil Co. v. Smith*, 4 Fed. Supp. 624 (So. D. Tex.), *Railroad Commission of Texas v. Rowan & Nichols Oil Co.*, 310 U. S. 573 (s. c. below, 24 Fed. Supp. 131, and 107 Fed. (2d) 70), where diversity was absent. This is also true of the many cases, from *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362, to *Thompson v. Consolidated Gas Utilities Corp.*, 300 U. S. 55, where constitutional questions were decided, even though jurisdiction attached on the concurrent ground of diversity. Appellants' contention involves the obviously untenable proposition that the jurisdiction of the federal courts in cases arising under the Constitution is conditioned upon diversity of citizenship.

The other two cases relied upon by appellants, *Texas Steel Co. v. F. W. & D. C. Ry. Co.*, 120 Tex. 597 (Brief, p. 39) and *Railroad Commission v. Beaver Reclamation Co.*, 132 Tex. 27, (Brief, p. 40) are cases brought for other purposes, in which an unsuccessful effort was made to assail Commission orders incidentally and collaterally. In the former, the Steel Company sued the railroad company for overcharges in rates and for penalties. The Commission was not a party, and the court held that in such action the Commission tariffs, apparently valid, could not be assailed. In the second case, the Beaver Reclamation Company brought suit against the Commission to set aside an order of its tender board

refusing to issue a tender as applied for. The Commission defended by interposing a general regulation which provided that tenders were available only to those holding a permit to pick up what was known as wash-in, or salvage, oil. The plaintiff had neither acquired nor applied for such permit, and had filed no suit attacking the Commission's general rule requiring the permit as a condition to the right to receive tenders. The court held that such general rule was not subject to collateral attack in the suit complaining of the refusing of the tender.

The two Texas cases are in this respect analogous to such cases as *Wadley Southern v. Georgia*, 235 U. S. 662; *St. Louis, I. Mt. So. R. Co. v. Williams*, 251 U. S. 65; and *G. C. & S. F. Ry. Co. v. State*, 246 U. S. 58, 62, affirming 169 S. W. 385; cases applying the familiar rule of the *Wadley Southern* case, where the affected railroads, having failed to invoke the aid of a court of equity in a direct attack, were held liable for penalties accruing during pendency of the actions for penalties for violating orders that on their face were valid.

In *Siler v. L. & N. R. R. Co.*, 213 U. S. 175, as of course the Court is aware, the Kentucky Commission's general rate order, and the statute underlying it, were attacked on local and on Federal constitutional grounds. There was no diverse citizenship and jurisdiction rested alone upon the presence of a Federal question. (213 U. S. 190.) There was a typical case of a direct attack. The right to a judicial review of the Commission's order is in no wise dependent upon the existence of the Texas statute. The State district court, being a court of general equity jurisdiction, would be open, as are the

Federal courts, to test the constitutional questions and any other questions appropriately raised. *Home Telephone Co. v. Los Angeles*, 211 U. S. 265, 278; *L. & N. R. R. Co. v. Garrett*, 231 U. S. 298, 311.

2. *The ground of attack that the order is without rational basis, and therefore contravenes the 14th Amendment, is not properly tested by reviewing merely the transcript of the evidence heard by the Commission.*

The above proposition is submitted in response to the contention (Appellants' Brief, p. 42, final par.) that the complaint stated no cause of action in that it did not challenge the order on the ground that it was supported by no evidence, or insufficient evidence, at the Commission hearing. The conductors so contend also. (Conductors' Brief, p. 24.)

It is true that a motion to dismiss (Motion 10, R. 62) was made on the ground stated. But the action of the Court in overruling the motion has not been assigned as error. And it will be observed that the contention is not within the Point I (c), (Brief, p. 32) under which it is advanced.

No Texas case has held that in reviewing an order of the Railroad Commission relating to railroads the trial in the State court is limited to a review of the Commission record.*

*We have examined the original record in a large number of Railroad Commission cases—nearly all of them relating to rate orders—and we have found no case in which the ground of attack was that the Commission's order was not "based upon substantial evidence." In every such case the Court was called upon to decide, and decided, the effect of enforcement of the order, as shown by facts adduced at the trial; and wholly without regard to what was heard by the Commission.

The review articles now relied upon by appellants (6453, 6454) as precluding consideration of evidence by the district court, as distinguished from a mere review of the Commission record, have not been so applied or construed in any case by the Supreme Court of Texas. In all such cases, whether the order of the Commission has been challenged on the statutory ground as being "unreasonable and unjust" as to plaintiff, or also on constitutional grounds, the case has been "tried and determined as other civil causes in said court."*. This is true of such cases as

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*The Court no doubt understands that the process, whether legislative or administrative, is finally concluded in the Railroad Commission, and that the review of the Commission's orders in the Texas courts is purely judicial. Indeed, considering the separation of powers under the Texas Constitution, it could not be otherwise. *Daniel, Ins. Comm'r, v. Tyrrell & Garth Inv. Co.*, 127 Tex. 213, 220, 93 S. W. (2d) 372 (1936). For like reason the Railroad Commission cannot be given the power to enact a law, that is, to exercise a function that is purely legislative; a valid standard has to be prescribed by the legislature itself. *Board of Water Engineers v. McKnight*, 111 Texas 82, 229 S. W. 301, and cases cited in *Consolidated Gas Corp. v. Thompson*, 14 Fed. Supp. 313 (affirmed 300 U. S. 55); see, also, *Railroad Commission v. H. & T. C. Ry. Co.*, 90 Tex. 340; *State v. St. Louis Southwestern Ry. Co.*, 165 S. W. 491, 496; *G. C. & S. F. Ry. Co. v. State*, 120 S. W. 1034. In view of the limitations of the Texas Constitution and of the statutes enacted thereunder, all reviews in court of administrative or legislative agencies are purely judicial, similar to the review noted by Justice Holmes in *Railroad Commission v. Duluth Street Ry. Co.*, 273 U. S. 625; and like that of Michigan, as recognized in *Detroit and Mackinac Ry. Co. v. Commission*, 235 U. S. 402. The Texas Constitution in this respect differs from State constitutions like that of Virginia *(Prentis v. Atlantic Coast Line*, 211 U. S. 210), and of Montana *(Porter v. Investors Syndicate*, 286 U. S. 461, 287 U. S. 346); and differs from what the State constitution was assumed to be in *Pacific States Box Co. v. White*, 296 U. S. 176, 183.

Railroad Commission v. H. & T. C. Ry. Co., 90 Tex. 340, 353, 354 (1897); *Railroad Commission v. Weld & Neville*, 96 Tex. 394, 403-405 (1903); *G. C. & S. F. R. Co. v. Railroad Commission*, 102 Tex. 338, 353 (1909); *Railroad Commission v. Galveston Chamber of Commerce*, 105 Tex. 101 (1912).* At the trial of the case last cited twenty-six witnesses testified, and the trial was *de novo* in every sense. From such evidence the trial judge made comprehensive, judicial findings of fact, and the Supreme Court explicitly rested its conclusion upon the unassailed findings thus made. No issue was raised or decided concerning what had taken place at the Commission hearing.

If an example is needed of cases arising in the Federal courts, we refer to *Reagan. v. Farmers' Loan & Trust Co.*, 154 U. S. 362 (1894), where the case apparently turned on the showing of confiscation under the threatened application of the rates as made in the bills of complaint, as distinguished from the insufficiency of the evidence heard by the Commission. (154 U. S. 362, 367-368, 400-413.) Since by the complaints the sufficiency of the evidence heard by the Commission was not challenged, the demurrers should have been sustained if the rule now contended for by appellants is correct.

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*In that case the court expounded the meaning of the burden of proof statute, requiring that as a condition to setting aside the order it should be shown "by clear and satisfactory evidence" to be unreasonable and unjust. (Art. 6658, R.C.S. 1911, Sec. 7 of original Commission Act.) This burden has been removed by the present statute, Art. 6454, R.C.S. 1925. (*Infra*, p. 107.)

In *United Gas Co. v. Texas*, 303 U. S. 123, the case was tried upon a statute imposing upon the plaintiff the burden of establishing by "clear and satisfactory evidence" that the orders complained of were unjust and unreasonable. Even so, the Court recognized (p. 132) that "the trial was essentially *de novo*," saying, at pp. 139-140: "The proceeding in the State court undoubtedly purported to afford an independent judicial review. As the Court of Civil Appeals said in the instant case, the trial of the issues whether the rate was unreasonable or confiscatory was '*de novo*.' Appellant itself recognizes that the trial 'was essentially *de novo*, new and full testimony being introduced as to property value, depreciation, reserve accrual, revenues, expenses, rates of return, etc.'"

The State courts have held that the validity of the Commission's orders is to be tested by the evidence adduced in the State trial court, and that the Commission record is not admissible "except by way of impeaching a witness." *State v. St. Louis Southwestern Ry. Co.*, 165 S. W. 491, 499 (1914). To the same effect are: *Empire Gas & Fuel Co. v. Railroad Commission*, 94 S. W. (2d) 1240, 1244; *Stanolind Oil & Gas Co. v. Midas Oil Co.*, 123 S. W. (2d) 911, 913; and *Railroad Commission v. Rau*, 45 S. W. (2d) 413. The case last cited was tried under the motor carrier review statute (Sec. 17, Art. 911a, Vernon's Ann. Civ. Stats.), which at that time expressly provided for a trial *de novo*. In consequence, the Court said:

"Similar provisions appear in R. S. arts. 6059 and 6453, giving the right of appeal to the courts from

orders of the railroad commission in other matters; and the holding has been, wherever the question has arisen, that the proceeding in the district court is a trial de novo, and not merely a review of the railroad commission's action upon the record made before the commission." (45 S. W. (2d) 415.)

The apparent conflict between that holding and the rule announced in the McDonald case *(Railroad Commission of Texas v. McDonald*, 90 S. W. (2d) 581, relied upon by appellants, Brief, p. 43) is explained by the circumstance that between the dates of the two decisions the motor carrier review statute was amended, expressly providing that the Commission opinion should be admissible in evidence at the trial and it was under the amended statute, Art. 911b, Sec. 14(b), that the McDonald case was decided.*

We deem it unnecessary to accumulate the cases except to observe that in cases arising under the motor carrier statutes applicable to certificates of convenience for truck or bus carriers, the applicants are mere licensees on the highways, and the reasons for affording a more limited review are obvious.

The Commission's action here brought under judicial review is legislative in nature and not merely administrative. In reviewing administrative action, the inquiry is concerned with the facts as they existed at the time the agency acted, as distinguished from the facts existing at a later time; whereas, in testing the validity of an act of a legislative nature, the inquiry relates to the way in which the legisla-

*The amended statute has since then been amended again, Acts of 1937, p. 651, Sec. 911b, Vernon's 1939 Supp.

tion affects the plaintiffs at the time of the trial. The nature of the inquiry therefore necessarily allows proof of facts subsequently arising—facts relating to the application of the legislative act. In all such legislation, as Judge Cardozo has said, "from the hour of its enactment, there thus inheres the seed of an infirmity which the future may develop. It is the infirmity that always waits upon prophecy."* If it is invalid at all, the invalidity must be grounded upon the facts existing at the time it is assailed in court. And if the court cannot ascertain these facts, then the court cannot determine whether the order bears upon the plaintiffs in a way forbidden by the Constitution.

Even if it should be conceded that the order is properly tested by reviewing the Commission record alone, the order could not stand, since the findings clearly import that the Commission was governed by wholly untenable standards and criteria. No amount or kind of evidence would sustain an order that affirmatively exhibits, as this one does, its extra-legal purpose and its utter want of a lawful foundation. *Tagg Bros. v. United States*, 280 U. S. 420, 442 (1930).

II.

There Is No Statutory Basis for the Challenged Order

(In reply to Appellants' Point II, Brief, p. 43.)

Appellants, called upon to find a statutory basis for the order "requiring that all sleeping cars be in

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Municipal Gas Co. v. Commission, 225 N. Y. 89, 121 N. E. 772, 774 (1919).

charge of a Pullman conductor" (Appellants' Brief, p. 43), place their reliance in a combination of Articles 6445, 6448, authorizing the Commission to "correct abuses," and 6474, defining and prohibiting "unjust discrimination." Apparently they concede that, as announced in *Railroad Commission v. Railway Co.*, 90 Tex. 340, 38 S. W. 750, the Commission has no roving discretion to define abuses. In the case cited Judge Brown* for the Coura said at page 354: "What abuses can the Railroad Commission correct? We think that it must be some abuse which has been defined by the law, and that the Commission would not by this power be authorized to enact a law defining what is an abuse or a disregard of duty on the part of a railroad corporation."

Appellants say (Brief, p. 53) that the failure to provide a Pullman conductor on the single-Pullman-car trains, while such conductors are furnished on the longer trains carrying several Pullman cars gives an "undue or unreasonable preference or advantage to a particular person or locality," and that the order is "designed and intended" to prevent such unjust discrimination, as defined by Article 6474. If the order is so "designed and intended," why is it not limited to removing the so-called discrimination?

The gravamen of the offense of unjust discrimination is inequality—unreasonable inequality of treatment—arbitrarily preferring some among a group who occupy a common ground. The power to remove

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*Associate Justice, later Chief Justice, Brown, formerly as a member of the Texas Legislature, was the author and chief sponsor of the Railroad Commission Act.

the unjust discrimination does not include the power to say that this result shall be achieved by contributing more to those who are being disadvantaged, rather than less to those who are being preferred. This statutory limitation is implicit in the delegation.

Assuming that the furnishing of Pullman conductors on the longer trains carrying several Pullman cars, without furnishing Pullman conductors on the single-car trains, amounts to unjust discrimination, the inequality can be eradicated as effectively by taking the conductors from the longer trains as by supplying them on the shorter ones. The Commission has plainly exceeded its powers even if it be assumed that unjust discrimination is involved in the present method of operation.

The unjust discrimination statute, Article 6474 (appended, *infra*, p. 107), is a complete statute dealing comprehensively with the subject. The Legislature has thereby (a) prohibited; (b) defined, unjust discrimination; (c) devolved duties upon the Railroad Commission in respect of certain portions thereof; and (d) provided a penalty as a means of enforcing obedience. The acts denounced in Sections 1, 2 and 3 constitute unjust discrimination. Section 4 prescribes the penalty; Sections 2 and 3 define the Commission's duties in respect of the subject of unjust discrimination.

By Section 2 the Commission is authorized to prescribe regulations designed to facilitate and require proper handling by connecting carriers. Section 3 deals with the subject of comparative rates as between long and short hauls and confers upon the

Commission the power to authorize proper differentials relating thereto, and also to authorize "group rates."

Obviously the challenged order does not, and is not claimed by appellants to, fall within Sections 2 or 3 of the statute. It is said to be within the latter portion of Section 1. As above indicated, it is significant that in respect of Section 1 no duties are imposed upon the Commission, whereas by the article specific duties are devolved as to Sections 2 and 3, and it seems plain that if the present method of operating the single Pullman car lines without a Pullman conductor is violative of Article 6474, the statute contemplates that it shall be vindicated by resorting to the penalty provision, without calling upon the Railroad Commission to adopt a definitive order.

We submit that there is no warrant for the appellants' criticism of the trial court's action (Brief, p. 64, last par.) in applying the rule announced in *St. L. S. W. Ry. Co. v. State*, 113 Texas 570, 261 S. W. 996. The statute there involved, Article 6670, R. C. S. 1911, was reenacted (without change other than arrangement, not here material) as Article 6474, R. C. S. 1925. The case referred to was decided on April 30, 1924, and the 1925 Code was finally passed on March 18, 1925. To such extent as the former statute was construed by the State Supreme Court, the construction was approved by the Legislature.

We have no desire to quibble, however, over the difference between a discrimination that is unjust, as is connoted by that term in its ordinary sense, and

a discrimination that works an undue or unreasonable preference. In either case it is plain that the discrimination does not offend the statute unless it is unjust, and that the preference is not denounced unless it is undue or unreasonable. What the trial court decided was that such difference, if any, as is involved in leaving the Pullman conductors off the single Pullman car trains, is not an unjust discrimination within the meaning of Article 6474; and that such preference, if any, as is so involved, is not an undue or an unreasonable preference. Appellants formally challenged the Court's finding, but we submit that they have not succeeded in overturning it by resorting to the record. The trial court found:

"9. The challenged orders are not within the authority delegated to the Railroad Commission by Article 6474, Revised Civil Statutes of 1925. The operation of the sleeping car on such trains as those described in Exhibit G, in charge of a Pullman porter, subject to the supervision, direction and control of the train conductor, does not amount to unjust discrimination as defined in said statute. The Railroad Commission has no authority to add to the definition. The statute does not require that every train be made the exact duplicate of every other train. It is not unjust discrimination to adapt the service to the varying traffic conditions." (R. 369.)

The above finding is said by appellants to be erroneous in that "under the facts in this case plaintiffs have been, and are now, operating sleeping cars on some lines of railroads without said cars being in charge of Pullman conductors, and at the same

time have operated sleeping cars on other lines with said cars being in charge of a Pullman conductor and the operation of sleeping cars on different lines in different manners in such fashion constitutes a discrimination and an abuse in violation of Article 6474." (Error No. 17, Appellants' Brief, p. 26.)

The question is whether the Commission's action falls within the scope of its delegated powers. The action is sought to be justified by saying that to operate trains without Pullman conductors while other trains are operated with Pullman conductors amounts to discrimination within the meaning of the statute. If the presence of the conductor on one train mandatorily requires the furnishing of conductors on all trains, how can it be true that, as stated in Point V (Brief, p. 80) "possibly some of the plaintiffs were entitled to an injunction" while others were not? The test of unjust discrimination is made the difference between furnishing the conductor and not furnishing the conductor. It is said that the statutory offense is committed if the conductor is furnished in one case and is not furnished in all cases. And, yet, at the same time it is said that traffic conditions may warrant an exemption. The unjust discrimination statute is thus relied upon to sustain the mandatory provisions of the order; and then the criterion by which discrimination *vel non* is to be determined is repudiated as being unreliable.

The violation of a valid order of the Railroad Commission is made punishable by heavy penalties (Articles 6476, 6477, *infra*, p. 109). Consequently,

the applicable rule of construction is the one announced in *Railroad Commission v. T. & N. O. Railroad Co.*, 42 S. W. (2d) 1091, 1093 (1931), writ of error refused, as follows: ". . . . the statute under construction is not only remedial in its nature, but penal as well and must be construed with at least a reasonable degree of strictness with respect to including anything beyond the immediate scope and object of the statute, even though within the spirit, and nothing can be added to the act by inference or intendment."

The Commission has made it plain in its findings that the basis for the order is the difference between having the Pullman car in charge of a white Pullman conductor and having it in charge of a negro porter. (See Findings Nos. 16, 17, 18, 22, 27, 29, *ante*, pp. 6-8.) What the Commission has undertaken to do is to enact a police regulation, which it now seeks to sustain by resorting to the unjust discrimination statute. The findings upon which the order is made to rest leave no room for doubting that the Commission deems it improper in any circumstances to have the Pullman car in charge of a negro. They undertake to condemn as an abuse the operating of a train with a Pullman car unless the car is in charge of a white Pullman conductor. These findings are in no sense conditioned upon the fact that other trains are operated with Pullman cars in charge of Pullman conductors. The findings, if true, would condemn the withdrawing of the Pullman conductors from the trains on which they now operate. And yet it is plain that by withdrawing the conduc-

tors from these trains the so-called discrimination would be completely removed.*

Typical is the part of the Commission's Finding No. 17 that "the womanhood of Texas entertains a fear of serious bodily injury or personal attack from a negro man and that to subject them as passengers in Pullman cars to the service where there is only a negro porter in charge would be to such passengers, as well as all other passengers, an undue and unjust discrimination, prejudice and abuse." (R. 46.) If so, the evil is not remediable by removing the discrimination—the inequality of service. Within the meaning of the anti-discrimination statute it could not be an offense to place all Pullman cars on all trains in charge of the Pullman porters. But according to the finding this would still be a prejudice and an abuse, and is positively forbidden by the order.

This exposes the order for what it is, a police regulation resting upon supposed considerations of public policy. The resort to the descrimination statute is a subterfuge.

Appellees submit that to remedy such supposed evils the Legislature has committed no such discretion to the Railroad Commission. If the Commission's findings—the overwhelming record to the con-

*Excepting the rate features (not now attempted to be sustained by appellants) the challenged order cannot be complied with by making new rate differentials, and the question whether such differentials should be allowed is not here involved. The prohibitory feature of the order, requiring the presence of a Pullman conductor on all trains, cannot be complied with by setting up rate differentials.

trary—are assumed to be true, the serious question of establishing by law the State's public policy in dealing with the problem has not been delegated to the Commission. If it has, why is the Commission driven to the untenable position of relying upon the discrimination statute? The question whether, agreeably to the Texas Constitution, such matters could be so delegated, we need not consider. The Legislature has enacted a comprehensive code of railroad laws expressing the public policy of the State, designed to promote the safe operation of railroads and the protection of passengers. It has occupied the field of legislation dealing with train crews and has not authorized the Commission to supplement the full crew law, Article 6380, R. C. S. 1925 (*infra*, p. 106). Other statutes are abstracted in the appendix to illustrate the policy of the State in reserving to the Legislature the exclusive power to enact police laws. (*Infra*, p. 111.) Particularly is this true of such delicate and important matters as attempt to deal with race questions.

Section 1 of Article 6474, the statute relied upon by appellants, is not a service requirement statute; in main, it is an anti-rebating statute. It does not compel the railroads to render identical service as between trains or to provide the same number of employees on every train. It forbids discrimination as to charges between shippers and passengers "for doing a like and contemporaneous service." And it also prohibits any railroad from giving any undue or unreasonable preference or advantage to any particular person, etc., or to subject any particular de-

scription of traffic to any undue or unreasonable prejudice, delay or disadvantage.

Appellees submit that operating a train carrying one, two or three day coaches and one Pullman car with the regular train crew and one Pullman employee does not "subject a particular description of traffic to any undue or unreasonable prejudice, delay or disadvantage," even though other trains carrying several sleeping cars have a Pullman conductor in addition to the porter. It is not an unjust discrimination to adapt the service to the varying conditions of traffic.

If the statute requires every train to be an exact counterpart of every other train, the railroads must furnish on all trains a lounge car, a lounge car attendant, a barber and barber shop, shower baths, the most modern type of chair cars and other equipment, and identical schedules, regardless of the needs or conditions of traffic; or else furnish such conveniences on no trains. If every train must be the counterpart of every other train, neither the railroads nor the Pullman Company can improve the services by modernizing their equipment, unless at the same time they place the improved equipment and service on every train. As a practical operating problem, this would prevent improvement and would put a stop to all progress.

III.

The order is without rational basis, and contravenes (a) the due process clause and (b) the equal protection clause of the 14th Amendment of the United States Constitution.

(In reply to Appellants' Point III, Brief, p. 70.)

The concluding statement in the district court's Finding No. 7 (*ante*, p. 14) has not been effectively challenged. The Court said: "In view of the Pullman Company's experience, extending over a long period of years, there is no reasonable basis for a finding contrary to the facts stated in this Finding No. 7." (R. 368.) The Court's Finding No. 7 and the order outlawing the porters-in-charge are utterly irreconcilable. Unless the Court's findings should be overturned, the conclusion is inescapable that the Commission's order is without rational basis. If so, the order contravenes the due process clause of the 14th Amendment as to the original plaintiffs, The Pullman Company in particular, and the equal protection and due process clauses as to the intervening plaintiffs, the porters. Since the two points are supported by a common group of facts, to separate them completely in argument would involve repetition.

A. *From the standpoint of The Pullman Company and the railroads*, the order represents arbitrary action, in that, as found by the district court, there is no need of an additional employee of The Pullman Company on the single Pullman car lines. The facts in support of the court's Finding No. 7 to that effect are fully set forth, *ante*, pp. 20, 22, 33-34.

The contention that the order may be sustained on the assumption that the Pullman porter, being a negro, is incapable of successfully policing the car, is also devoid of merit.

The railroads and The Pullman Company recognize that in so far as the duty devolves upon the employes on the train to furnish reasonable protection the responsibility is primarily that of the railroad company. If the railroad company has the responsibility, some choice must be left with that company as to how it shall be discharged. Assuming that the legislature may prescribe certain minimum requirements looking to the performance of the company's duties in that respect (as, for example, requiring a minimum train crew, including a conductor or head official), this is far from saying that the Commission may supplement these provisions by compelling the railroad company to place one of the cars on the train in charge of an employee, not of the railroad company, but of The Pullman Company.

If the train is not being properly policed, and additional regulations are needed then, if the responsibility is to be left with the railroad company, the most that the Commission could do (assuming delegated power to prescribe reasonable and appropriate regulations) would be to require the railroad company to conform to proper standards or, if need be, to furnish an additional employee on the train for the purpose.

The Commission's order is sought now to be sustained on an entirely different theory. Appellants seek to uphold it as an exercise by the Commission of the power to prevent "unjust dis-

crimination," as defined by statute. Nowhere is it contended in the appellants' argument that the Commission has the power to supplement the Full Crew Statute by requiring the railroads to furnish additional members of the train crew on these shorter trains, in the interest of the safety of the passengers. And yet that this is what the Commission has professed to do is plainly shown by the various findings in the order itself. The invalidity of the order is exposed by the Commission's effort to legislate in a field and for a purpose not within the scope of the Commission's powers. "In short, we believe that the orders in question are unreasonable and void as to plaintiffs because issued in the attempted exercise, not of delegated, but of usurped powers." *McMillan v. Railroad Commission*, 51 Fed. (2d) 400, 405, per Judge Hutcheson for district court.

Indeed, the order as a whole exhibits its own infirmities. Its very professions condemn it as being beyond the reach of the Commission's legitimate powers. The self-interpretation contained in the order reveals the purpose of the Commission to accomplish that which is forbidden. Although avowedly issued to prevent unjust discrimination, it is also confessedly issued for other purposes beyond the scope of the Commission's powers. Such professions reveal not only the illegal purposes but the necessarily illegal effect and operation of the order. *Brimmer v. Rebman*, 138 U. S. 78, 83-84 (1891; unanimous opinion by Justice Harlan).

"Any pretense or masquerading will be disregarded, and the true purpose of a statute ascer-

tained." *Smith v. St. L. S. W. Ry. Co.*, 181 U. S. 248, 257 (1900), citing *Chy Lung v. Freeman*, 92 U. S. 275, and the leading case of *Henderson v. Mayor of New York*, 92 U. S. 259. The order "will not be saved by name or form." Mr. Justice Holmes in *G. H. & S. A. Ry. Co. v. Texas*, 210 U. S. 217, 227.

In principle, the rule was applied in *Minnesota v. Barber*, 136 U. S. 313, as is shown by the statement made in the full paragraph on page 328 in the unanimous opinion by Mr. Justice Harlan. Similar reasoning was employed to expose the invalidity of the order of the Interstate Commerce Commission that was condemned by the Court in the unanimous opinion of Chief Justice White in *Southern Pacific Co. v. Interstate Commerce Commission*, 219 U. S. 433. There, it was made plain that an order emanating professedly from the Commission's rate making authority was not actually exerted for that purpose. The Court held that the nature and character of the order was such that, although on its face it appeared to be a rate order, the power actually exerted by the Commission was not a rate making power. In short, while it pretended to be, it was not, a bona fide rate order. The Court said that, although portions of the record indicated that rate matters had been considered, "we think when the opinion is considered as a whole in the light of the condition of the record to which we have referred it clearly results that it was based upon the belief by the Commission that it had the right under the law to protect the lumber interests of the Willamette Valley from the consequences

which it was deemed would arise from a change of the rate, even if that change was from an unreasonably low rate which had prevailed for some time to a just and reasonable charge for the service rendered for the future." (At p. 449.)

The Court will observe that it is not the purpose of this order to require a Pullman conductor to remain constantly on every Pullman car in the train. It is the purpose of the order to require one Pullman conductor on the train, regardless of the number of cars. Reference in the order to the 17 runs affected by the order makes this plain. The record shows without dispute that the longer trains, carrying as many as 8 Pullman cars (R. 143, 284), are commonly operated with one Pullman conductor. The order presupposes that such service is satisfactory. The order would leave one conductor on the heavy, 8 Pullman car trains, and would require one on the light, single Pullman car trains; whereas the court has found, and the facts show, that one employe is all that is needed on the latter.

B. *If it be supposed that the legislature has the power of prescribing the number and qualifications of employees on a railroad train, neither the Legislature nor its agent can forbid the Company to employ a man on account of his race.* It is obvious that in a constitutional sense the fitness of the porters to have charge of the Pullman car, under the supervision of the railroad conductor, is conclusively determined by considerations wholly apart from race. If in point of training, intelligence, and character the man satisfies reasonable standards, the fact that his race does not render him ineligible has been con-

clusively determined by the 14th Amendment, any finding by the legislature or its agent to the contrary notwithstanding. *Yick Wo v. Hopkins*, 118 U. S. 356 (1886).

The arbitrary effect of the Commission's order is direct and unavoidable: Interpreting the holding of the Court in *Yick Wo v. Hopkins*, a great jurist has said that "There the vice in the ordinance was not 'the consequence of adventitious circumstances.' People ex rel. Alpha Portland Cement Co. v. Knapp, 230 N. Y. 48, 58, 129 N. E. 202. Its prohibitions had been cunningly framed to reach a single class. Discrimination was its very purpose. No process that was valid could ever be issued under it."* So here the order has been "framed to reach a single class," but the prohibition of the class, instead of being cunningly hidden, lies plainly exposed on the face of the order, its findings included. This order says, not merely in its implications, but in words, that the negroes are not equal to the whites and that, in consequence, they are not entitled to receive equal treatment. Being legislative in its effect, the order stands condemned by the 14th Amendment.

The concluding paragraphs of the Commission's order (R. 52-53) do not in so many words prescribe that the Pullman conductor called for must be a white man, but the recitals in the order make it entirely clear that the supposed evils to be corrected consist in permitting a negro to perform work other than what the Commission terms janitor service on the car. The order must be construed and inter-

*Judge Cardozo, concurring opinion in *People v. Atwell*, 232 N. Y. 96, 133 N. E. 364, 367 (1921).

preted in its entirety, and when so construed there can remain no doubt that the meaning and intent of the order is to require that every train carrying a Pullman car shall be accompanied by a white Pullman conductor.

Consequently, if the order should be allowed to stand, the railroads and the Pullman Company would be compelled either to add the Pullman conductors or to withdraw the one-car lines from service. The former would involve a heavy annual expense, $5,000.00 of which would be contributed by the porters-in-charge in the form of the extra pay now allowed them for service in that capacity (R. 145-146). And in the latter alternative a large number of porters, and other equipment service employees, would be thrown out of employment entirely. (R. 137.) And this is to befall the porters, not in consequence of their want of character, training, or intelligence as individuals, but because they are negroes and not white men.

Experience has removed the question from the realm of debate: The assumption by the Commission that a white Pullman conductor is indispensable to maintaining order or keeping the peace in the Pullman car is overthrown by the facts. The test is different from what it would have been 50 years ago. Even if it be assumed that then a regulation of this kind would have been supportable, resting upon prophecy and speculation as to what might happen, such assumption is not allowable now when prophecy has been supplanted by experience. Events always control and override

predictions where the two are in conflict. In *Chastleton Corp. v. Sinclair*, 264 U. S. 543, 547, Mr. Justice Holmes said: "And still more obviously so far as this declaration looks to the future it can be no more than prophecy and is liable to be controlled by events." See, accord; *Municipal Gas Co. v. Commission*, 225 N. Y. 89, 121 N. E. 772 (1919)—unanimous opinion by Judge Cardozo; *Van Dyke v. Geary*, 244 U. S. 39, 48 (1917), per Justice Brandeis; *Los Angeles Gas, etc. Co. v. Railroad Commission*, 289 U. S. 287, 305; *Consolidated Water Co. of Utica v. Maltbie*, 3 N. Y. S. 799, 167 Misc. 269. Here, the record without dispute supports the findings of the District Court that the experience of the company in operating according to this method for more than 50 years in the United States and for more than 20 years in Texas, and in other places in the South (e. g., on trains running in and out of New Orleans) for approximately 25 years, renders it unnecessary to rely upon speculation. The experimental period is over, and we now know that the so-called dangers incident to this method of operating are imagined and not substantial.

The rule announced by this Court, per Mr. Justice Cardozo, in *West Ohio Gas Co. v. Commission*, 294 U. S. 79, 82, is apposite:

"We have said of an attempt by a utility to give prophecy the first place and experience the second that 'elaborate calculations which are at war with

realities are of no avail.' Lindheimer v. Illinois Bell Telephone Co., 292 U. S. 151, 164. We say the same of a like attempt by officers of government prescribing rates to be effective in years when experience has spoken. A forecast gives us one rate. A survey gives another. To prefer the forecast to the survey is an arbitrary judgment."

As suggested from the bench during the trial (R. 262), the facts relevant to traveling in Pullman cars in this country are generally known, and consequently we take it that they are within judicial cognizance. If it be argued, however, that, contrary to the record and the findings of the District Court, conditions are peculiar in Texas, calling for some kind of special treatment, we submit that the Court would not be warranted in overturning the findings of the local judges who heard the evidence and had the responsibility of determining the credibility of the witnesses.

In *Laurel Hill Cemetery v. San Francisco*, 216 U. S. 358, 365, Mr. Justice Holmes observed "the propriety of deferring a good deal to the tribunals on the spot" in determining the validity of police regulations challenged as being unreasonable or arbitrary. This is true for the reasons stated by Mr. Justice Brandeis in *Nashville, C. & St. L. Ry. v. Walters*, 294 U. S. 405, 433: "When the scope of the police power is in question the special knowledge of local conditions possessed by the state tribunals may be of great weight. Compare *Welch v. Swasey*,

214 U. S. 91, 105, 106; *Laurel Hill Cemetery v. San Francisco*, 216 U. S. 358, 365."

The local judges not only have the advantage of interpreting the evidence in the light of the domestic background but in a case of this kind this is of less importance than is their superior opportunity of weighing the evidence—of determining credibility. See cases cited, *ante*, page 15.

The statements of the disinterested witnesses who testified for the defendants (appellants) to the effect that they would prefer to have a Pullman conductor (*ante*, p. 23) or that they would feel safer with a Pullman conductor, and the statement of one of the ladies that she would not permit her children to ride and would herself prefer not to ride on a Pullman car without a white conductor (R. 335-336), proved nothing in a legal sense. Such whims, and expressions of personal preferences and casual opinions furnish no legal support for the order. "That the inhabitants of a place demand greater facilities than they have is not at all conclusive as to the reasonableness of their demand for something more." *Atlantic Coast Line v. Wharton*, 207 U. S. 328, 335.

The district court has found (*ante*, p. 13), and the facts, without dispute, support the finding, that the porters-in-charge as a group, including the intervener-plaintiffs, are competent and that they have rendered satisfactory service over a long term of years. (*Ante*, pp. 15-22.)

The fancied objections to the porters as contained in the findings incorporated in the challenged order are ascribed to them as a class because of their color.

The fact inquiry involved in the legislative determination that race or color renders them incompetent for the positions now held by them has been settled the other way by the 14th Amendment. The legislative process has to proceed on that basis as an accepted fact. The vice inhering in this order is not essentially different from the one that worked condemnation of the ordinance in *Chaires v. Atlanta*, 164 Ga. 755, 139 S. E. 559, 55 A. L. R. 240. There it was said that the operation of the ordinance would in its enforcement prevent all colored men, diseased or not, from serving white children as barbers. Here the operation of the order would in its enforcement prevent all of the porters, competent or not, from serving as porters-in-charge. See the apposite case of *Alston v. School Board of City of Norfolk*, 112 Fed. (2d) 992 (C.C.A. 4th, 1940); certiorari denied Oct. 28, 1940, No. 429; and cases there cited. See also *People v. Ringe*, 197 N. Y. 143, 90 N. E. 451, 454. The order ignores the "righteous distinction between guilt and innocence." It is arbitrary and illegal because it imposes its burden "where the evils are absent as where they are present." *Tyson v. Banton*, 273 U. S. 418, 443.

We submit that the order is without rational basis; and that it contravenes the due process and the equal protection clauses of the 14th Amendment.

IV.

The order is not rendered invulnerable by the arbitrary provision stating that, upon application, "deviation" from its terms might be allowed, on undisclosed conditions, if the Commission should see fit to do so.

(Answer to Point V, Appellants' Brief, p. 80.)

1. If such "deviation" should be permitted, for example, as to 16 lines, and refused as to the one remaining line, The Pullman Company, the interveners and the railroad company thus affected would still be entitled to maintain the action. Essentially, The Pullman Company and the porters-in-charge are the parties most vitally affected. Since it is not suggested that "deviations" would in any circumstances be allowed as to all lines, the necessity for the present action is unavoidable.

In the argument in Appellants' Brief (p. 82) they say that the question whether "deviation" from the order should be allowed is determinable by traffic conditions, which vary as to each of the 17 lines. But they took the opposite position in their answer to the complaint. Plaintiffs alleged that the absence of Pullman conductors on the 17 lines was warranted by the difference in the demands of traffic as between those lines and the heavier trains carrying several Pullman cars. (Complaint, Par. 25, R. 21-22.) Replying, defendants specifically denied that "the need for a Pullman conductor on a given train is determined by operating conditions affecting that train, including the volume of traffic, the length

of the train with the consequent demands upon the time and services of the railroad and Pullman employees, ..." (R. 69-70). And that "In this connection defendants show that other factors than those mentioned in said paragraph enter into the need of a Pullman conductor . . . ." (R. 70). The "other factors" were not in that connection stated, but we may assume that they were stated in the findings (quoted in part immediately below) contained in the challenged order—the factors that, as viewed by the Commission, rendered the porters incompetent to have charge of the cars in any circumstances.

2. The order has been twice entered: first, without a hearing and, again, after hearing. Following the hearing the Commission found:

"(8) * * * there are seventeen separate and distinct operations on the various railroads in Texas without pullman conductors in charge of pullman cars. The Commission further finds that all other runs other than the seventeen operations disclosed by the evidence, do have a pullman conductor in charge of the pullman cars; that the failure to have Pullman conductors on the seventeen operations is a discrimination against the passengers who ride on those particular runs in that all other operations of Pullman cars do have Pullman conductors; * * * (R. 41-42).

"(16) The Commission further finds from the evidence that the porters on Pullman cars are negro men.

"(17) * * * if negro porters are placed in charge of the Pullman cars when the service of a conductor is dispensed with that there is imminent danger of insults to the lady passengers on the Pullman

cars and that such condition exists in the seventeen operations by the Pullman Company where they do not use conductors, as hereinabove referred to, and that the same constitutes an abuse and an undue and unjust disadvantage and discrimination; . . . " (R. 46).

At the time of trial there were 17 runs on which the single line Pullman car is in charge of a Pullman conductor. They are the identical lines that were involved at the Commission hearing and referred to in the Commission's findings, except that (a) at the time of the trial, Line 3010, the train from New Orleans, Louisiana, to Oakland, California, was being operated in charge of a porter between Sweetwater and Texico, on the Panhandle and Santa Fe Railway Co. (R. 56); at the time of the Commission hearing and also at the time of the trial, the Pullman car on this train was also being operated in charge of a porter between Houston and New Orleans (in Texas between Houston and Sabine River—See Line 3010, R. 55); (b) at the time of the trial, Line 3106 (last "Line," R. 56) was a porter-in-charge line, between Amarillo and Denver, but at the precise time of the Commission hearing this line was in charge of a Pullman conductor, since at that season, in consequence of the summer tourist travel between Texas and Colorado, additional sleeping cars were carried on the train. As a matter of fact, however, this line has been seasonally operated in this fashion for a number of years; that is, in the winter months one of the Pullman cars is dropped off at Amarillo and the conductor remains with that car while the other car proceeds to Denver with the porter in charge. It

is not claimed that there is anything distinctive about this line or Line 3010 that would entitle them to peculiar treatment as distinguished from the other 15 lines. And if they were out, the case would still be here as to the others. (c) After the Commission hearing and before the trial, Line 3258 (bottom of R. 55) had been discontinued; that is, the Pullman car had been withdrawn from service. (R. 114.)

The trial began on February 17, 1940, a Saturday. At noon a recess was taken, and the trial resumed on Monday morning, February 19, 1940. (R. 127.) On the convening of court on Monday morning, the court asked for an interpretation of the provision of the order above referred to, with the view of determining whether court action was at that time required. (R. 127-131.) Appellees stated that they had been to the Commission in respect of each of the lines excepting two of them and that they regarded the provision of the order as being but an additional arbitrary feature. This colloquy took place:

"Judge Sibley: They were separately presented to the Commission?

"Mr. Graves: Yes, sir, every one except the two that have been inaugurated since the hearing.

"Judge Sibley: You say about one or two of these runs, that they don't involve anything but interstate passengers. Was all of that before the Commission?

"Mr. Graves: Yes, sir.

"Judge McMillan: Did they make any order?

"Mr. Graves: No, sir. Exhibit F is a new order they made after the hearing, and it contains the broad, sweeping, prohibitory provision in the exact

language of the original order they entered without notice or hearing.

"Judge Sibley: And then added this opportunity to come back to the Commission? Is that a single charter car or something?

"Mr. Graves: I don't know, Your Honor. (R. 129.)

"* * *

"Mr. Graves: These are all of the porter in charge operations in the State of Texas, and we would still be here with this very bill.

"Judge Sibley: Well, if they mean business, if they have considered this thing and made their decision there isn't any reason to go over it again. I was just asking if they had done that.

"Mr. Graves: Yes, sir, they have considered all of them except the two runs inaugurated since then.

"Judge Sibley: Judge McMillan wants to put it to you pretty pointedly. He wants to ask you straight off the bat that as representatives of the Commission whether the Commission regards these matters as open or whether they regard them settled?" (R. 130.) (This was addressed to counsel for the Commission.)

In response, counsel for the Commission, instead of answering the Court's question, undertook to view the order objectively and, so viewing it, said:

"If the Court please, about the only way we can answer that is in this way, that looking at this order and considering it in the light of the testimony that was given before the Commission, which we have read, it doesn't seem to me that the order is necessarily intended to preclude each and every line of operation in the State of Texas . . . ." (R. 130).

Counsel for the Commission then undertook to state in general what was before the Commission

in the form of evidence and as to questions considered,—a very general statement. (R. 130.) Judge Sibley then inquired:

"Now, in finding five they say there are seventeen lines run at present without a conductor, and that the passengers on them pay the same amount and don't get the same service, and they find that there is a discrimination there. That looks like they passed on it.

"Mr. Lewis (counsel for the Commission): Yes, Your Honor, that paragraph does, all right."

In view of the statements that had been made by counsel as to what had transpired at the Commission hearing we offered in evidence the Commission record:

"Mr. Graves: In connection with the question that the Court has raised, I will ask counsel if he has a copy of the transcript, the official transcript of the record before the Commission?

"Mr. Rotsch: Yes, sir, we have it.

"Mr. Graves: We would like to offer in evidence this transcript, if the Court please.

"Judge Sibley: That is a whole lot of evidence. Is there any result coming from that? Of course, we ought to test what they did by what they ordered. (Counsel for the Commission made no comment.)

"Mr. Graves: That has been our contention, Your Honor.

"Judge Sibley: You all don't agree about it. We are killing time. Go ahead with the evidence." (R. 131.)

At another stage of the hearing we offered in evidence, for limited purposes, the Commission rec-

ord and, on objection by defendants (appellants) that it was irrelevant and immaterial, it was excluded. (R. 354.)

We submit that when the Court called upon the Commission at the trial to ascertain whether it meant business as to the 17 lines then involved, the Commission was not entitled to answer by viewing the order in an objective sense. The Commission and the Attorney General were defendants in the action and, as such, their response was evasive. Moreover, the complaint (par. 34, R. 27) charged, and the answer (R. 72) admitted, that in the absence of an injunction defendants would endeavor to subject the plaintiffs to heavy penalties if they should attempt to operate the Pullman cars without a Pullman conductor.

3. Since unjust discrimination is the sole statutory basis relied upon, and the failure to furnish the conductor on any train constitutes the offense (or else none is denounced), the Commission has no power to grant exemptions or "deviations" that would amount to suspending the law. So, if it be assumed that the Commission has the power, at its discretion, on unnamed conditions, to suspend the requirement, this implies that the statutory offense of unjust discrimination is not committed at all by the mere act of not having a Pullman conductor on the train. If, as the Commission asserts under its Point II, the failure to provide a Pullman conductor constitutes a violation of the penal statute, Art. 6474, then manifestly the Commission has no power to pardon the offender.

And when the Commission at once affirms (a) that by failing to furnish a conductor on any train

the statutory offense of unjust discrimination is committed, and (b) that the Commission has the power to immunize some of the railroads while holding others responsible to the law, the Commission creates this dilemma: either the act condemned by the Commission as an offense is not such, or the Commission's professed willingness to consider granting exemptions in individual cases is an empty gesture. And since, as already shown, the violation of the order is attended with heavy penalties, the so-called exemption provision, even though it is an exemption to be allowed at the Commission's option, renders nugatory the entire order. There is no basis for sustaining the order at all unless, as a matter of law, unjust discrimination is inevitably committed whenever the conductor is left off of any train. Unless this is an offense, none has been named. But the admission by the Commission that, in undisclosed circumstances, to leave the conductor off of a given train is not an offense, denudes the defined offense of the only gravamen supplied by the definition.

If, as stated by appellants in their Point V (Brief, p. 80), "possibly some of the plaintiffs were entitled to an injunction," or that possibly some of the plaintiffs were entitled to "a modification of the order," this can only mean that it is not an offense under some circumstances to operate a Pullman car without a Pullman conductor. The order forbids the operation of a Pullman car in any circumstances without a Pullman conductor. To save the order the Court can not modify it. The order must stand or fall as written. And since the Commission has admitted, both in the order and in its brief (Point

V), that in undefined circumstances unnamed individuals or companies may be entitled to alleviation from the order, this is an effective admission that as a penal order it cannot stand. The order provides that, regardless of circumstances, a conductor shall be furnished. If, as is asserted by the Commission, there are circumstances in which it is not an offense to operate the train without a Pullman conductor, let the circumstances be revealed. Otherwise, we have regulation by caprice and not by law.

We are not dealing with a regulation applying to subject-matter the very nature of which requires exceptions in order that the regulation may be reasonable in its application, or where exceptions are needed in order to carry out fully the purpose of the regulation. Compare *Gorieb v. Fox*, 274 U. S. 603, 607. According to the express findings of the Commission, the evils at which the regulation is directed exist in the case of each and all of the 17 lines. The purported evils inhere, not in individual instances, but in the class. Hence, it is plain that any exceptions that might be granted under this "deviation" clause, in favor of members of the class, would be in the nature of mere personal and therefore unsupportable exemptions.

V.

Answer to errors specified "to be urged" but not otherwise urged.

1. Error No. 1(a), (Appellants' Brief, p. 17): In so far as this point has been argued, it has been answered by our Point I B (*ante*, p. 51). In addi-

tion, it is devoid of merit since (a) there was no "plea to the jurisdiction of the court"; (b) there was no motion to dismiss on the ground stated; (c) there was no motion challenging jurisdiction in equity on the ground that the contracts as pleaded were illegal and void because they represented an attempt on the part of the railroads to delegate a part of their charter powers to a foreign corporation; (d) indeed, there was no motion or pleading of any kind presenting the defense stated in Error 1(a).

2. Error No. 1(b), (Appellants' Brief, p. 17): This error was not presented by any motion or pleading. The complaint was in no manner challenged on the grounds stated. Even if the point had been raised, it would have presented nothing more than a basis for requiring a more particular statement in the complaint; and no motion for greater particularity in that respect was made.

3. Errors Nos. 2 and 3 (Appellants' Brief, p. 18) have been answered under our Point IA (*ante*, p. 47).

4. Error No. 4 (Appellants' Brief, p. 19) has been answered under our Point II (*ante*, p. 66).

5. Error No. 5 (Appellants' Brief, p. 19) has been answered by our Point III (*ante*, p. 76).

6. Error No. 6 (Appellants' Brief, p. 19) complaining of the district court's ruling that the rate features of the order are invalid because of want of notice—has been factually answered by the statements from the record under the head "2. Facts Touching the Rate Features of the Challenged Order" (*ante*, p. 10).

Apparently the point has been abandoned. No statements from the record appear in Appellants' Brief, purporting to support the point. Obviously where the Commission's jurisdiction to promulgate a rate order is conditioned upon notice, the Commission cannot conclude that question by reciting that notice was given. Where, as here, the notice as given is in the record (R. 34) and there is no dispute about it, and where it says nothing about rate matters, the Commission's recital that notice was given is not controlling. When we offered the Commission record, the last time, Judge Sibley stated: "What sort of hearing there was would be primarily fixed by the notice required. You have got the notice here." (R. 355.)

7. Error No. 7 (Appellants' Brief, p. 20); (This point has apparently been abandoned by the Commission, although it is presented by the Conductors in their Point No. 5, p. 27). The assertion that "this was an order authorized by said Code (Sanitary Code) and the statutes in regard to the enforcement thereof" has not been made in an assigned error (R. 373); and, we submit, is patently unsubstantial. The order is not, and does not purport to be, an exertion of powers so conferred, although the conductors contend that the Commission's Finding No. 13(c) is so supported. That finding concludes: "that the Pullman conductor is specifically charged with the responsibility of regulating the same (heating and air-conditioning) and that he receives special instructions in the operation of the same." (R. 44; Conductors' Brief, p. 29.) The finding, if it means that the porter-in-charge is incapable of attending to such matters, has been

overthrown by Finding No. 7 of the district court (*ante*, p. 13). As to air conditioning specifically, see "Porter and Air Conditioning" (*ante*, p. 31).

8. The proposition contained in Error No. 8 (Appellants' Brief, p. 21), is an abstract one, since neither The Pullman Company nor the railroad companies had notice that rates would be considered at the Commission hearing. Moreover, the Commission sought to prescribe and regulate sleeping car fares in 1907. The company litigated the question and it was settled adversely to the Commission by the United States Circuit Court of Appeals, Fifth Circuit, in 1908, and the judgment became final. No written opinion was filed and apparently the case was not reported. We have appended, *infra*, p. 114, a report of the litigation as contained in the records of the Attorney General's Office. Since then the Legislature has not enlarged the Commission's rate powers so as to include sleeping car fares, but the Codes of 1911 and 1925 have substantially readopted the statutes touching those matters as they existed in 1907.

9. Errors Nos. 9 (Appellants' Brief, p. 21) and 14 to 18, incl. (Brief, pp. 24-26), present in varying forms the contention argued by appellants under their Point II, and has been answered by us, under our Point II, (*ante*, p. 66.)

10. Errors Nos. 10 and 19 (Appellants' Brief, pp. 22 and 27) present, in effect, the contention (urged in Appellants' Brief, p. 42) that we are not entitled to test even the constitutional questions by judicial trial but that all that the Court can do is to review the Commission record and inquire whether

any substantial evidence was heard by the Commission supporting its order. This contention we have answered under our Point I (Sub. C), (*ante*, p. 58). Despite the concluding assertion in Error 19 (Brief, p. 27) the complaint did allege interference with interstate commerce and the taking of plaintiffs' property without due process of law. See, for example, paragraphs 36 c, d, e, h, i, and j (R. 28-30). In presenting the same contention in abstract form, the Conductors say (Brief, p. 24): "It is suggested that many of the same witnesses who appeared before the Railroad Commission likewise appeared before the Trial Court and thus substantially the same testimony was heard. Based upon such testimony the Trial Court arrived at a different conclusion to the administrative body and simply reversed the conclusions of the Railroad Commission." We do not understand the import of such statements. The record affirmatively shows that none of the 10 Pullman porters who testified at the trial testified at the Railroad Commission hearing. In fact, the record shows that they had no notice of the hearing and were not present. (R. 353.) It was affirmatively shown that some of the witnesses at the trial did testify at the Commission hearing. In the absence of the Commission record, we are not at liberty to say more. And, as elsewhere shown, we are not responsible for the fact that the Commission record is not here.

11. Error No. 11 (Appellants' Brief, p. 22) complains, ineffectively, of the District Court's Finding No. 7. The point has been briefed by appellants, in so far as briefed at all, under their Point III. (Ap-

pellants' Brief, p. 70). As elsewhere shown herein, District Court Finding No. 7 has been insufficiently challenged since (a) it has not been charged in any assignment, and the evidence has not been pointed out showing, that the finding is clearly erroneous. See discussion, *ante*, pp. 14-15; (b) we have shown (*ante*, p. 41) that the finding not only is abundantly supported by the record, but that no other finding was permissible under the facts. It is apparent that appellants have staked their case upon the proposition that the trial in the district court, even where constitutional questions are drawn in issue, is confined to the single inquiry, whether substantial evidence was heard by the Commission in support of its order. This proposition being groundless, the appellants simply have no assignment of error effectively challenging the findings of the district court on the controlling fact questions in the case.

12. Error No. 12 (Appellants' Brief, p. 23), asserting that the plaintiffs' case is grounded in monopolistic contracts and that therefore plaintiffs have no standing in a court of equity, is an afterthought. (a) It was not assigned as error in the assignments of error (R. 373). Indeed, apparently the point has been abandoned and will not be pressed. (b) No motion to dismiss the complaint was made on the ground asserted in Error No. 12. (c) It will be observed that the ground asserted is that the motions to dismiss should have been granted. It is not shown and cannot be shown that it appears from the complaint that the contracts between the railroads and The Pullman Company are void and illegal. (d) The question of the validity of

the contracts was not drawn in issue at the trial in any way. The case was tried on the opposite assumption. (e) The plaintiffs' cause of action is not predicated on the contracts in the sense that the action is a suit to enforce the contracts. The contracts were brought into the case by the plaintiffs for the purpose of showing that The Pullman Company and not merely the railroad companies are directly affected by the challenged order. Wherefore, it was proper to join all of the plaintiffs in a single action. This will be further noticed in reply to Appellants' Error 13, next below.

13. Error No. 13 (Appellants' Brief, p. 23): Appellants assert that the court erred in holding that the railroads are necessary and proper parties to the action "because such a conclusion is contrary to the evidence and testimony in this case and contrary to law." The point has not been briefed and we assume that it has been abandoned. In any case, it is without merit. The relation between The Pullman Company and the railroads was established without dispute. The order is directed against the railroads but it compels the railroads to require a Pullman conductor on every train carrying a sleeping car. Appellants' point is effectively answered by the District Court's second conclusion of law and the authorities supporting it as follows:

"Since the order is directed in terms against the railroads and not against The Pullman Company, the only way in which The Pullman Company can obtain effective relief is by means of an injunction prohibiting enforcement of the challenged orders against the railroads. For this reason and for the further reason that the order undertakes to deter-

mine, and interferes with, the rights of The Pullman Company in its contracts with the railroads, the railroads are necessary and proper parties to this action. Rule 19, Federal Rules of Civil Procedure; *Niles-Bement Co. v. Iron Moulders Union*, 254 U. S. 77, 81-82; see also *Troy v. Whitehead*, 222 U. S. 39, 41; *Ducker v. Butler*, 104 Fed. (2d) 236, 238 (App. D. C. 1939)." (R. 368.)

14. We assume that Errors Nos. 20 and 21 challenging the jurisdiction of the district court to decide the State question where, as here, jurisdiction rests, not upon diversity, but upon Federal questions, has been abandoned. It has not been briefed and is totally devoid of merit. Jurisdiction having attached on substantial constitutional grounds, the United States Courts have jurisdiction to decide every question, local and federal, properly arising in the case. *Siler v. L. & N. R. R. Co.*, 213 U. S. 175, 190, 191; *L. & N. v. Garrett*, 231 U. S. 298, 303; *Waggoner Estate v. Wichita County*, 273 U. S. 113, 116 (1926). We deem it unnecessary to accumulate the cases so holding.

VI.

Additional reply to points in Conductors' Brief.

(a) The Conductors' Point 1 (their Brief, p. 2) stating that "the only damage alleged or proved" was that the plaintiffs "would be prevented from collecting illegal, unauthorized and extortionate tolls and fares," is based upon a misapprehension of the record. Factually it is completely answered by the District Court's Findings of Fact Nos. 2 and 3.

(R. 366; stated in full, *ante*, p. 2.) Both of the findings are unchallenged by any assignment of error or any specification of error.

The argument presented by the Conductors under their Point 1 is wholly unrelated to the point, except a portion on pages 8 to 10, already answered in our reply to Appellants' Point I(a), *ante*, p. 47.

(b) The Conductors' Point 2 (their Brief, p. 11) is not within the scope of any asignment of error or specification of error. Nevertheless it has been answered at *ante*, pp. 10-13.

We do not question the power of the Railroad Commission to prescribe, within statutory limits, railroad rates. But when we appeared in response to the notice issued by the Commission we did not appear under a notice indicating that rates would be considered; and there is nothing in the record to show that any of the plaintiffs waived their right to the statutory ten days' notice (Article 6449) that conditions the Commission's rate making powers.

(c) From the abstract proposition of law stated in the Conductors' Point 3 (their Brief, p. 21), we have no occasion to dissent. In so far as there is substance in the argument presented under the point, we have answered it in reply to the Appellants' Point I(b) *ante*, p. 51.

(d) We find it unnecessary to combat the abstract statement made in Conductors' Point 4 (their Brief, p. 24), but the point is inapplicable. In so far as the argument presented under it seeks to apply the proposition to this case, we have answered it in reply to Appellants' Point I(c), beginning

ante, p. 58. The Conductors' last paragraph of the argument under that point (p. 26), wholly unrelated to the point, has been answered in our reply to Appellants' Point V, beginning *ante*, p. 87.

(e) The Conductors' Point 5, in so far as it invokes the Public Health Sanitary Code, has been answered by us (*ante*, p. 97) in reply to appellants' unargued specification of error No. 7.

We have no occasion to dissent from the Conductors' diagnosis of the challenged order as being an attempted "exercise of the police power of the State." To that extent the Conductors are aligned with us and against the Commission. The Commission seeks to uphold the order by ascribing it to the Commission's authority to prevent "unjust discrimination," as defined by Article 6474. The order, its findings included, bears irrefutable internal evidences of the Commission's design to enact a police regulation—in the interest of what the Commission has repeatedly in its findings referred to as the safety and convenience of the passengers. The Attorney General, properly recognizing that the Commission has no such power, has presented no such point.

The contention thus advanced by the Conductors bespeaks a want of confidence in the stand taken by the Commission in defending its order. Such contention is answered by the court's Finding No. 7, as to which there is no effective assignment of error and no effective point of argument in the brief of either the Commission or the Conductors.

(f) The Conductors' Point 6 is not within the scope of any assignment of error, and the argument

under it touches none of the issues in the case. The constitutional attack upon the order is not conditioned upon the unreasonableness of the cost of complying with it. The district court's findings, however, that to comply with the order will cost The Pullman Company $25,000.00 per annum after allowing all offsets; and that it will cost each of the porters-in-charge $13.50 per month during their active service, and a related amount during their retirement (Findings 2 and 3, R. 366), have not been challenged.

Conclusion

The order is not within the scope of powers delegated to the Railroad Commission; and consequently is violative of State law. It is without rational basis, and contravenes the 14th Amendment to the National Constitution. We therefore respectfully submit that the judgment of the district court appealed from should be affirmed.

Respectfully submitted,

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January 14, 1941.

APPENDIX

Art. 6380—Full Crew.

No railroad company or receiver of any railroad company doing business in this State shall run over its road, or part of its road, outside of the yard limits:

1. Any passenger train with less than a full passenger crew consisting of four persons: one engineer, one fireman, one conductor and one brakeman.

2. Any freight train, gravel train or construction train with less than a full crew consisting of five persons: one engineer, one fireman, one conductor and two brakemen.

3. Any light engine without a full train crew consisting of three persons: one engineer, one fireman and one conductor.

4. The provisions of this article shall not apply to nor include any railroad company or receiver thereof, of any line of railroad in this State, less than twenty miles in length; and nothing in subdivisions one and two hereof shall apply in case of disability of one or more of any train crew while out on the road between division terminals, or to switching crews in charge of yard engines, or which may be required to push trains out of the yard limits.

Any such company or receiver which shall violate any provision of this article shall be liable to this State for a penalty of not less than one hundred nor more than one thousand dollars for each offense. Suit for such penalty shall be brought in Travis County or in any county in or through which such line of railroad may run, by the Attorney General, or under his direction, or by the county or district attorney in any county in or through which such railroad may be operated. Such suits shall be subject to the provisions of Article 6477.

Art. 6453—Judicial Review. (See Appellants' Brief, pp. 94-95).

Art. 6454—Burden of Proof.

The burden of proof shall rest upon the plaintiff to show the rates, regulations, orders, classifications, acts or charges complained of are unreasonable and unjust to it or them.

Art. 6474—Unjust Discrimination.

Unjust discrimination is hereby prohibited and the following acts or either of them shall constitute unjust discrimination.

1. If any railroad subject hereto, directly or indirectly, or by any special rate, rebate, drawback or other device, shall charge, demand, collect or receive from any person, firm or corporation a greater or less compensation for any service rendered or to be rendered by it than it charges, demands, collects or receives from any other person, firm or corporation for doing a like and contemporaneous service, or shall give any undue or unreasonable preference or advantage to any particular person, firm or corporation, or locality, or to subject any particular description of traffic to any undue or unreasonable prejudice, delay or disadvantage in any respect whatsoever.

2. If any railroad company shall fail or refuse, under regulations prescribed by the Commission, to receive and transport without delay or discrimination the passengers, tonnage and cars, loaded or empty, of any connecting line of railroad, and every railroad which shall, under such regulations as the Commission may prescribe, fail or refuse to transport and deliver without delay or discrimination any passengers, tonnage or cars, loaded or empty, destined to any point on or over the line of any connect-

ing line of railroad; provided perishable freights of all kinds and live stock shall have precedence of shipment.

3. If any railroad company shall charge or receive any greater compensation in the aggregate for the transportation of like kind of property or passengers for the shorter line than for a longer distance over the same line; provided, that upon application to the Commission any railroad may in special cases, to prevent manifest injury, be authorized by the Commission to charge less for longer than for shorter distances for transporting persons and property, and the Commission shall, from time to time, prescribe the extent to which such designated railroad may be relieved from the operation of this provision. No injustice shall be imposed upon any citizen at intermediate points. Nothing herein shall be so construed as to prevent the Commission from making what are known as "group rates" on any line or lines of railroad in this State.

4. Penalty.—Any railroad company guilty of unjust discrimination as hereinbefore defined shall for each offense pay to the State of Texas a penalty of not less than five hundred dollars nor more than five thousand dollars.

5. Exceptions.—Nothing herein shall prevent the carriage, storage or handling of freight free or at reduced rates, or to prevent railroads from giving free transportation or reduced transportation under such circumstances and to such persons as the law of this State may permit or allow.

This is a reenactment without substantial change of Sec. 15 of the original Railroad Commission Act (Acts of 22nd Leg., 1891, pp. 55, 62; 10 Gammel's Laws, pp. 57, 64). It was first reenacted as Art. 4574, R. C. S. of 1895, then as Art. 6670, R. C. S. 1911.

Art. 6476—Penalty Not Otherwise Provided.

If any railway company doing business in this State shall violate any provision of this title, or shall do any act herein prohibited, or shall fail or refuse to perform any duty enjoined upon it for which a penalty has not been provided by law or shall fail, neglect or refuse to obey any lawful requirement, order, judgment or decree made by the Commission, for every such act of violation it shall pay to the State of Texas a penalty of not more than five thousand dollors.

Art. 6477—Suits for Penalty.

All of the penalties herein provided, except as provided in Article 6475, recoverable by the State shall be recovered and suits thereon shall be brought by the Attorney General or under his direction in the name of the State of Texas, in Travis county, or in any county into or through which such railroad may run; and the attorney bringing such suit shall receive a fee to be paid by the State of fifty dollars for each penalty recovered and collected by him, and ten per cent of the amount collected. In all suits arising under this chapter, the rules of evidence shall be the same as in ordinary civil actions, except as otherwise herein provided. All fines and penalties recovered by the State under this chapter shall be paid into the State Treasury; provided suits brought under Title 66 for recovery of penalties, may be brought in any county:

1. Where an act violative of any provision thereof is committed.

2. Where such company or receiver has an agent or representative.

3. Where the principal office of such company is situated, or such receiver or receivers, or either, reside. One-half of all moneys collected under the

provisions of said title, less the commission and expenses allowed by law, shall be paid into the State Treasury; the remainder thereof shall be paid into the treasury of the county where such suit or suits may be maintained and constitute a part of the jury fund of such county.

Art. 7063—Sleeping, Palace or Dining Car Companies.

Every sleeping car company, palace car company, or dining car company doing business in this State, and each individual, company, corporation or association leasing or renting, owning, controlling or managing any palace cars, dining cars, or sleeping cars within this State for the use of the public, for which any fare is charged, shall, on the first days of January, April, July and October of each year, report to the Comptroller, under oath of the individual or of the president, treasurer or superintendent of such company, corporation or association, showing the amount of gross receipts earned from any and all sources whatever within this State, except from receipts derived from buffet service, during the quarter next preceding. Said individuals, companies, corporations and associations, at the time of making said report, shall pay to the Treasurer of this State an occupation tax for the quarter beginning on said date equal to five per cent of said gross receipts as shown by said report. The tax herein provided for shall be in lieu of all other taxes now levied upon sleeping car, palace car or dining car companies, except the tax of twenty-five cents on the one hundred dollars of capital stock of such car companies as provided by law. Id.

Art. 7098—State Tax Board.

The State Tax Board shall be composed of the Comptroller, the Secretary of State and of the Attor-

ney General. A record of the proceedings of said board shall be kept at the State Capitol, and shall be open to the inspection of the public. Acts 1905, p. 35; Acts 1907, 1st C. S., p. 469; Acts 1939, 46th Leg., S. B. No. 119, Sec. 1.

Art. 7105—Tax on Intangible Assets.

Each incorporated railroad company, ferry company, bridge company, turnpike or toll company, oil pipe line company, and all common carrier pipe line companies of every character whatsoever, engaged in the transportation of oil, doing business wholly or in part within this State, whether incorporated under the laws of this State, or of any other State, territory, or foreign country, and every other individual, company, corporation or association doing business of the same character in this State, in addition to the ad valorem taxes on tangible properties which are or may be imposed upon them respectively, by law, shall pay an annual tax to the State, beginning with the first day of January of each year, on their intangible assets and property, and local taxes thereon to the counties in which its business is carried on; which additional tax shall be assessed and levied upon such intangible assets and property in the manner provided in this chapter. The county or counties in which such taxes are to be paid, and the manner of apportionment of the same, shall be determined in accordance with the provisions of this chapter. Acts 1905, p. 35; Acts 1907, 1st C. S., p. 469; Acts 1933, 43rd Leg., p. 409, ch. 162, Sec. 12.

Other Railroad Statutes.

Other railroad statutes, with condensed statement of their subjects, are listed below. They are referred to, not as having any bearing on this case, but as illustrating the policy of the State in regulating

the railroads in a detailed way through acts of the Legislature.

Article 6458—Emergency freight rates.

Article 6459—Temporary tariffs—"whenever an emergency arises."

Article 6466—Commission shall ascertain cost of railway, etc.

Article 6470—Commission shall investigate all through freight rates, etc.

Article 6473—Provides a penalty of not less than $100 nor more than $5000 per day if any railroad company subject to the provisions of this title shall be guilty of extortion as defined in the statute.

Article 6479—Conferring certain powers upon the Commission to relax requirements as to number of passenger trains, providing for hearings; stopping at county seats.

Articel 6479a—(Acts 1933, 43rd Leg., p. 280, Ch. 110) Requiring adequate and frequent freight rates and conferring certain powers upon the Commission in that respect after hearing.

Article 6481—Requiring railroad company to furnish freight cars to shippers.

Article 6482—Penalty.

Article 6490—Requiring every railroad company to provide sufficient tracks, switches, sidings, yards, depots, motive power, cars and all other needful facilities and appliances for receiving and delivering freight.

Article 6491—Requiring railroads to interchange cars at junction points.

Article 6492—Authorizing Commission to make rules governing the furnishing of freight cars and for exchanging and interchanging the same.

Article 6496—Defining shipper.

Article 6497—Defining "reasonable time" for furnishing cars to shipper.

Article 6498—Requiring railroad companies to provide and maintain adequate, convenient and clean depots, etc.

Article 6499—Authorizing Commission to require union passenger depots.

Article 6503—Declaring as an abuse the operation of double header trains under certain circumstances and authorizing the Commission to investigate such abuses and see that same are corrected, regulated or prohibited as hereinafter provided.

Article 6504—Same subject.

Article 6505—Penalty for same.

Article 6506—Authorizing Commission to require railroad to maintain road bed and track in proper condition.

Article 6507—Penalty.

Article 6509—Requiring sidings and spur track.

Article 6510—Authorizing Commission to require compliance with "preceding article."

Article 6511—Requiring railroad to connect with private switch, tracks and to furnish connections therefor.

Article 6512—Authorizing Commission to enter orders governing maintenance and operation of switch connections.

Article 6513—Authorizing Commission to fix rates for moving freight over spur tracks to private industries.

Article 6514—Authorizing Commission to prescribe rates for operation of side tracks, spur tracks, etc.

Article 6515—Preventing discrimination as to spur tracks and authorizing the Commission to order railroads to furnish equal accommodations to all shippers "similarly situated on the same terms and conditions."

Article 6516—Penalty.

Article 6517—Giving action for damages for violation of 6 preceding articles.

Article 6518—Authorizing Commission to investigate and to require after notice and hearing rearrangement of tracks, switches and depot buildings.

Article 6519—Penalty.

Report of Pullman Fare Case.

No. 1791.—*The Pullman Company et al. vs. Railroad Commission of Texas:* Suit for injunction in the Circuit Court of the United States, Northern District of Texas, to restrain the enforcement of an order of the Railroad Commission reducing the rates to be charged for berths and seats in sleeping cars.

The demurrers to plaintiff's bill were argued and overruled, and the court rendered judgment on February 4, 1908, continuing in force the temporary injunction which had theretofore been issued. The time for filing answer was enlarged to the rule day in January, 1908, and the defendants appealed from the order continuing the injunction in force, to the Circuit Court of Appeals, at New Orleans, which court affirmed the judgment of the Circuit Court at Dallas. (Reports of the Attorney General of Texas, 1906-1908, p. 36.)